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# THE INTERPRETATION OF STATUTES.

Sir Maurice Sheldon Amos.[1]

SECTION 21 of the Matrimonial Causes Act, 1857, provides that a wife deserted by her husband may apply to a metropolitan police magistrate for an order for the protection of her earnings; and the statute further provides that it shall be lawful for the husband and for his creditors to apply to the magistrate who made the order for the discharge thereof. A Mrs. Sharpe obtained such an order, and in 1864 her husband wished to apply for its discharge. He discovered that the magistrate who had made the order was dead; and the question what was now his proper course of action came before a bench composed of Cockburn C.J., Blackburn and Shee JJ., who decided unanimously that this was a *casus omissus*, and that it was not competent for the husband to apply to some other metropolitan magistrate who might present the advantage of being alive. Forthwith, and in the same year, there was passed the Matrimonial Causes Act, 1864, which consists of one section only, and which provides that 'if the said magistrate shall have died or been removed or have become incapable of acting, then in every such case the husband . . . may apply to the magistrate for the time being acting as the successor or in the place of the magistrate who made the order.'

This incident brings to my mind a conversation I had some fifteen years ago with a very eminent Italian lawyer who was

[1] A lecture given at the London School of Economics on March 15, 1933.

then, like myself, in the service of the Egyptian Government. We were debating, line by line, a draft of a Civil Procedure Code. The matter in hand was the enumeration of sundry powers to be vested in the president of a civil tribunal, and the draftsman had again and again referred to this officer as the 'president.' Knowing well that it was the intention that these powers should be exercisable not only by the titular president, but also by any other judge who might be temporarily delegated or appointed to discharge the duties of the presidential office, I complained of the absence of any definition clause to give the necessary latitude to the meaning of the word 'president.' My Italian colleague contended that this was unnecessary; to which I answered, with some vivacity, 'But, sir, words are things,' and the Italian took the point and replied, 'Not at all'—thus by one word reminding me that we were in the Latin world.

Before I attempt to philosophize upon this attitude towards legislative language, let me give you another example taken from Continental legal literature, but this time not from the Franco-Italian circle, but from Germany. I have recently been reading a little book by Professor Ernst von Hippel of Königsberg, called 'Einführung in die Rechtstheorie,'—a book which I am told has enjoyed a considerable popularity in Germany. It is in the form of dialogues between a law professor and his student son, who is beginning his law studies. The father brings up the subject of the meaning of legal rules, and relates how when a man was convicted of stealing electric current, and his appeal on the point of law came before the Reichsgericht, that Court consulted experts in physics on the question whether electricity was a Thing; and when the physicists reported that it was not, the Supreme Court quashed the conviction. Wrongly, says the professor; electricity might very well be a *Sache* for the purpose of theft, though not being so in the eyes of the physicist. And then he goes on to remind his son of the notice which hangs on the wall of the baker's shop, which says that it is 'Polizeilich Verboten' to brings dogs into the shop. What is meant by 'dogs' in this warning? Would it be a breach of the regulation to bring a fox, or a wolf, or a goat with one when one went in to buy a roll? And when the son replies that he supposes that such conduct would be a breach of the regulation, and an offence, because those other animals are obviously more unclean than a harmless dachshund, the father approves his answer. 'If you ask a zoologist, he will tell you that a goat is not a dog. But thou seest that while the legal concept of a dog no doubt has the zoologist's notion for its

point of departure and its normal application, yet it must, according to circumstances, be stretched more widely or restricted more narrowly if thou wishest to avoid unreasonable results. The true meaning of the legal concept of dog can only be obtained by considering the sense of the rule—" den Sinn der Norm." '

A striking illustration of what I may call the Latin attitude towards legislative texts is furnished by the interpretation which, in the course of the last seventy years, the French Courts have placed upon Arts. 1120 and 1122 of the Civil Code. Article 1120 lays down the familiar rule that one cannot by agreement with another person confer a contractual right of action upon a third party, a stranger to the transaction—*res inter alios acta, aliis neque nocet neque prodest.* Then Art. 1122, reproducing the traditional law of pre-revolutionary France, states two exceptions to this rule; one is the case where the stipulation for the third party is the condition of a stipulation made for oneself; and the other is the case where the benefit stipulated for the stranger is the condition of a gift made to the promisor. The principal applications given to these exceptions under the old law were found in the domain of 'substitutions,' that is to say, of settlements. This topic was much restricted in importance by the Code, and as a result Art. 1122 was left rusting in the legal armoury for half a century or so after the promulgation of the Code. But no civilized system of law can dispense with devices whereby it is possible to elude the *res inter alios acta* rule; we in England elude it by trusts, by covenants running with the land, and by positive legislative enactments. In France practitioners began, about 1860, to cast greedy eyes at Art. 1122 and the Courts, on their side, displayed remarkable benignity in the interpretation of that text. The first of the two exceptions is that which grants the third party his action whenever the promisee, the stipulator, has made the non-performance of the obligation to the third party the condition for the vesting of a right in himself, the promisee. The Courts have held that this proviso is satisfied whenever the promisee has stipulated for a penalty, conditional on the non-performance of the obligation to the stranger. Thus if I make you promise to pay John Smith £100 on January 1 next, and further to pay me a penalty of £500 should you fail to do so, John Smith acquires a direct right of action against you, a right which becomes irrevocable so soon as Smith expresses his intention to avail himself of it. The second exception is that which gives the stranger his action whenever the promisee has stipulated for that right in his

favour as a condition of a gift made to the promisor. Now this rule the Courts have interpreted in a very liberal manner, and have held that the word *gift* in Art. 1122 may be taken to include any consideration moving from the promisee, whether a conveyance of present value, or a bare promissory engagement. And the final result is summed up by Planiol in the following terms: At the present day the maxim 'One cannot stipulate for a stranger' has become a dead formula devoid of sense, and its preservation in our laws must be considered to be a phenomenon of historical survival. The formula which truly expresses the solutions admitted by our jurisprudence is the contrary of what the Code says, and is to the effect that 'a contract for the benefit of a stranger is valid and vests in him a right of action in every hypothesis.'[2]

Now it would be a great error to look upon this episode of French legal evolution as illustrating anything hostile in the attitude of the Courts towards the Civil Code: far from it; the Code left a door ajar, and the Courts have quite legitimately pulled it wide open; and in so doing have rendered, in this, as in many other instances, a service to the Code, in making it appear susceptible of perpetual adjustment to the requirements of practical life, similar to the service which our own Courts have always prided themselves in rendering to the doctrines of the Common Law.

Let me now give some more examples illustrating the formal and arm's-length attitude which, at any rate until quite recent years, our own judges have tended to adopt towards Parliamentary law. My examples are trite learning, and derived from familiar sources; but they will serve as sufficient illustrations of some points which I hope to make; and in particular of the fact that, as for the ancient Romans, so for us, words are things.

Thus, where an Act of Parliament disqualified all persons from killing game who did not possess land of a certain value, excepting only the heir-apparent of an esquire or other person of higher rank, it was held, in *Jones* v. *Smart*,[3] that the exception did not extend to the esquires themselves. The sons were exempted, because they were expressly mentioned, but not the fathers, because they were not.

An Act of 9 Geo. 4, c. 40, s. 38, empowered justices to order the removal of lunatics to a hospital where there was no lunatic asylum established in the county. It was held in *The Queen* v.

[2] Planiol, *Traité Élémentaire de Droit Civil* (11e ed.), II, § 1234.
[3] (1785) 1 T. R. 44.

*Ellis*[4] in 1844 that this statute did not authorize the county justices to send a lunatic to a hospital where there was a lunatic asylum in the county but it was so full that it could not receive another lunatic.

The Bills of Sale Act, 1878, required that the execution of bills of sale should be attested by a solicitor, and that the attestation should state that the solicitor had explained the nature of the instrument to the grantor before execution. It was held in *Ex p. National Mercantile Bank*,[5] by James, Baggallay and Bramwell L.JJ., that this provision did not render it necessary that the solicitor should in fact have given the grantor any explanation, but only that he should say that he had done so. Well has it been said that *absoluta sententia non indiget expositore.*

An interesting example of verbalism in interpretation is furnished by the fact that the Married Women's Property Act, 1882, has been so construed as to preserve the liability of a husband for his wife's torts.

Section 1 of the statute provides that the husband need not be joined when the wife is sued for a tort; and sections 14 and 15, dealing with the husband's liability for the wife's pre-nuptial contracts and torts, provide that that liability is limited to the extent of the property acquired by him from or through his wife, and that if he is sued jointly with her, and is found not liable, he is entitled to his costs.

In *Seroka* v. *Kattenburg*[6] the question was raised whether these provisions had the effect of relieving the husband from his Common Law liability in respect of his wife's post-nuptial torts. It was argued, or certainly arguable, that the statute, taken as a whole, had removed the only rational basis for the husband's liability; but Mathew J. and A. L. Smith J. (as he then was) decided otherwise. A. L. Smith J. said: 'The Act of 1882 is primarily an Act consolidating and amending the law relating to the property of married women. It contains two very remarkable sections, the fourteenth and fifteenth, in relief of the husband, but it has no section relieving him from liability for wrongs done by his wife after her marriage. This clearly shows that it is an Act in favour of the wife, and does not affect the liability of the husband except in those instances where there is a specific limitation in his favour.'[7]

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[4] (1844) 6 Q. B. 501.
[5] (1880) 49 L. J. Bk. 62.
[6] (1886) 17 Q. B. D. 177.
[7] Approved in *Earle* v. *Kingscote* [1900] 2 Ch. 585, and more recently in *Edwards* v. *Porter* [1925] A. C. 1, *dissentientibus* Lord Birkenhead and Viscount Cave.

A striking modern example of the interpretation of a statute is to be found in Lord Birkenhead's statement of the reasons for which the Committee for Privileges rejected Lady Rhondda's petition for a writ of summons to Parliament.[8] The question was whether the Sex Disqualification (Removal) Act, 1919, availed to substantiate Lady Rhondda's claim. At first sight the language of the statute seems conclusive. 'A person shall not be disqualified by sex or marriage from the exercise of any public function.' Lord Birkenhead's judgment is very long, learned, interesting and impressive; but I do not think it is unfair to say that a substantial part of his argument was to the following effect. The effect of the statute is to remove disqualifications. But Lady Rhondda was not disqualified, since to be disqualified you must first be fundamentally qualified, and thereupon suffer a supervening disqualification. Now Lady Rhondda's patent, or rather the limitation in her favour in her father's patent, while giving her a peerage, did not give her a peerage coupled with a right to a writ of summons; such is not the effect of a peerage vested in a woman—not because of a disqualification, but because of the absence of the primordial qualification.

Once again, section 3 of the Wills Act, 1837, authorizes every person to dispose by will of all such real and personal property as would otherwise have passed to his heir or personal representative. What of a person who had no heir or personal representative, as might very easily be the case if the *propositus* was illegitimate? There does not appear to have been any actual reported decision to the effect that such a person was incompetent to make a will under the statute of 1837. But serious doubts were entertained by learned persons, doubts which will be found expressed in the seventh edition of Theobald on Wills; and consequently the Law of Property Act, 1925, devotes a section (178) to setting these doubts at rest, by providing that 'section 3 of the Wills Act, 1837, shall, without prejudice to the rights and interests of a personal representative, authorize and be deemed always to have authorized any person to dispose of real property or chattels real by will notwithstanding that by reason of illegitimacy or otherwise he did not leave an heir or next-of-kin surviving him.'

It certainly seems rather hard on the draftsman of the Wills Act that nearly a hundred years later it should have seemed necessary for Parliament to explain what he meant upon an

[8] [1922] 2 A. C. 339.

apparently elementary point, for that draftsman certainly spared himself no trouble. That this is so, any reader may readily satisfy himself by referring to section 3 of the statute, which is too long to quote here. It furnishes a good example of the frenzy of caution to which at that time draftsmen were driven by the reign of judicial terror under which they lived. If the judges could not be relied upon to help, by occasionally taking something for granted, the only course to take, so it seemed, was to endeavour to enumerate every possible case.[9]

You will, I daresay, not be surprised to learn that Dean Roscoe Pound has written upon the subject with which we are at present engaged. In the twenty-first volume of the *Harvard Law Review* you will find an article by him entitled 'Common Law and Legislation,' which contains much food for profitable meditation. The principal theme of this essay is the antithetical relationship which our system has established between the Common Law and statute law, the law deposited and preserved in the hearts of the judges and the law propounded by Parliament. Dean Pound remarks—I will quote his language—that 'four ways may be conceived of in which Courts in such a legal system as ours might deal with legislative innovation. First: they might receive it fully into the body of the law as affording not only a rule to be applied, but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. Second: they might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject. Thirdly: they might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy, but giving it nevertheless a liberal interpretation to cover the whole field it was intended to cover; and fourthly: they might not only refuse to reason from it by analogy, and apply it directly only, but also give it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.'

'The fourth hypothesis,' says Dean Pound, 'represents the orthodox Common Law attitude towards legislative innovations. Probably the third hypothesis, however, represents more nearly

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[9] A remarkable recent instance of the verbal interpretation of a statute, resulting in a patent deviation from the intention of Parliament, is to be found in *Ellerman Lines* v. *Murray* [1931] A. C. 126.

the attitude towards which we are tending. The first and second hypotheses doubtless appeal to the Common Law lawyer as absurd. He can hardy conceive that a rule of statutory origin may be treated as a permanent part of the general body of the law. But it is submitted that the course of legal development upon which we have entered already must lead us to adopt the second and eventually the method of the first hypothesis.'

The subject of drafting is evidently germane to the subject of interpretation. It is difficult to believe that in the days when the Statute of Frauds was passed there was any effective awareness, even in the highest ranks of the legal profession, that legislative drafting was an art of which it was possible for very eminent lawyers to be ignorant. It is common knowledge, however, that one of the many fields in which Bentham exercised a beneficent influence was in that of the framing and language of statutes. One striking feature of the new models and methods which were gradually brought into use early in the nineteenth century was the adoption of the practice of statutory definitions. On this subject let me observe in passing that I have encountered no trace of a similar practice in Continental statutes, and that the ideal of the formal definition appears to be displeasing to the Continental lawyer. On one occasion I had to discuss a draft Penal Code with a very accomplished foreign jurist—another Italian. The draft began with a long chapter of definitions, of which the English authors were inordinately proud; but the Italian, far from seeing in this device an example of *elegantia iuris*, expressed acute aesthetic distaste. I fancy his feeling was that a Code ought to conform to more normal standards of literary form. That great authority on the Statute Book, the present editor of the Statutory Rules and Orders, tells me that while the device of making a statute contain its own miniature dictionary was not uncommon in the reign of George IV, it is doubtful whether examples are to be found of earlier date. There is an example in section 79 of the Reform Act [10]; a more elaborate one in section 1 of the Fines and Recoveries Act, 1833, and a still better one in section 109 of the Poor Laws Amendment Act of 1834. Meanwhile Lord Macaulay was planning what afterwards became the Indian Penal Code, and giving effect to new and admirable ideas of legislative drafting, with definitions, explanations, illustrations, and, above all, short clauses.

When you come down to the period of the great 'Clauses'

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[10] 2 Will. 4, c. 49.

Acts of 1845, the Lands Clauses Act, the Railways Clauses Act, and the Companies Clauses Act, draftsmanship, as Mr. C. T. Carr has said, was putting its best foot foremost, and really trying to be useful, and the dictionary clause is coming to be regarded as indispensable and inevitable. Then in 1850 we get the first Interpretation Act, commonly called Lord Brougham's Act, but entitled 'An Act for shortening the language used in Acts of Parliament'; and this Act, it will be remembered, was superseded by the Interpretation Act of 1889. I may perhaps call your attention, in this connexion, to a book which is insufficiently known, namely, the Index to Statutory Definitions, prepared in the office of the Parliamentary counsel, and published by H.M.'s Stationery Office in 1923. This publication contains about 4,000 definitions, including such varied fare as fish, horse, sheep, dog, cat, boy and girl, brother and sister, Chinese passenger ship, town clerk, mayor, professor, and feeble-minded person.

In view of the persistence of the traditional sense that statute law is an intruder, a bare licensee, in the domain of the Common Law, it is perhaps remarkable that more effective provision should not be made to anticipate inevitable problems of interpretation. I need only refer, by way of illustration, to the remarks of Scrutton L.J., on the fact that the draftsmen of the Rent Restrictions Acts had not contemplated the eventuality of the statutory tenant dying, becoming a bankrupt, or seeking to assign his right.[11] It would, I am confident, be possible to build up a discipline, or scientific art, of legislative drafting, which would secure that all the more plausible eventualities should be envisaged and dealt with. In the building up of such a science, I conceive that the analytical methods of thought which are the particular concern of schools of law would play an important part. One may well think that the history of crossed cheques, to take another example, would have been less troubled if academic lawyers had been consulted at an earlier stage.

There is, I think, much to be said for the view that drafts of laws ought always to be made in two languages concurrently. In Egypt, in my experience, official draftsmen derived undoubted advantage from the fact that laws had to be prepared in such a way that they could readily be translated from English into both French and Arabic, or else from French into English and Arabic; and to this test of lucidity and completeness they were

[11] *Haskins* v. *Lewis* [1931] 2 K. B. 1, at p. 9.

usually submitted at an early stage of their elaboration. In England it would perhaps be more practicable to require that they should be drafted concurrently in English and Ciceronian Latin.[12]

What are we to think of the rule which excludes from consideration in the interpretation of statutes, what the French call 'travaux préparatoires,'—reports of Royal Commissions and of parliamentary debates which have preceded and led up to the adoption of the statute under review? The question of the propriety of retaining this rule is one which in recent years has shown signs of becoming a subject of somewhat vivacious controversy.[13] It is interesting to learn that in America, as I understand, it has long been well established that for the purposes of construing a provision in a Constitution a Court will not hesitate to examine the relevant debates in the Constitutional Convention. In cases of a less exalted character it seems that in the United States there still obtains a distinct divergence of judicial opinion. But the Supreme Court is not disposed to be pedantic in the matter; and, to quote only one recent instance, in the case of *Omaechevarria* v. *Idaho*,[14] Brandeis J., delivering the opinion of the Court, and discussing the *ratio legis ferendi* of a certain Act of Congress, said 'the reports of the Secretary of the Interior upon whose recommendation the Act was introduced, the reports of the Committees of Congress, and the debates thereupon, indicate that this alone was the evil sought to be remedied.'[15]

I think it is impossible to ignore the existence of a certain connexion between the topic of the judicial interpretation of statutes and another subject which has been brought somewhat prominently before the public mind in recent years; I refer to the development of the practice of entrusting the interpretation and the enforcement of certain branches of the law, novel

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[12] Dr. Gutteridge, in his very interesting paper on 'Comparative Interpretation' in 8 Tulane Law Review, 1 (December, 1933), quotes Dr. Williams, speaking of the bilingual drafting of the Swiss Civil Code, to the effect that 'the very fact that a French translation of the Civil Code had to be made led to the altering of the German phraseology to meet the French expressions, so that greater clearness in the German version was the inevitable result.'

[13] See Professor H. A. Smith's effective plea for the greater latitude of the Continental practice in 'Interpretation in English and Continental Law,' 9 Jour. Comp. Leg. 153 (3rd series, 1927).

[14] (1917) 246 U. S. 343.

[15] Lord Macnaghten, discussing the construction to be placed upon the Trades Unions Acts of 1871 and 1876 in his speech in the *Taff Vale Case*, made an effective reference to the minority report of the Royal Commission on Trades Unions 'whose views found acceptance with the Legislature.' *Taff Vale Ry.* v. *Amalgamated Society of Railway Servants* [1901] A. C. 426, at p. 438.

statutory law, to administrative tribunals. I have no doubt that one of the motives of policy which has inspired the creation of these jurisdictions is the desire on the part of the executive Government, not to oppress the subject or to restore the arbitrary rule of the Star Chamber, but to escape from the tradition of technicality still largely dominant in our Courts. So long as Equity was a distinct branch of law from the Common Law, and was viewed with distrust and suspicion by the Common Law judges, it was able to survive and be effective only because it had its own judges and its own Courts. Is it not possible to see in the tribunals of Whitehall the natural response—a response perhaps somewhat long delayed—of Parliament, acting through its agents, the Ministers of the Crown, to the unfriendly bearing of the common lawyers towards statute law? When the Lord Chief Justice expresses his disapproval of administrative tribunals, is he not perhaps imitating, after three centuries, and in not wholly dissimilar circumstances, the resentment displayed by his predecessor, Lord Coke, against the encroachments of the Chancellor?

I wish now to return, for my last few minutes, to a brief consideration of the difference between the Continental, and in particular the French, attitude towards statute law and its interpretation, and our own.

As Dean Pound remarks, in the essay to which I have already referred, the Corpus Iuris taught the Continental world to look upon enacted law as the primary type. Even in England we find Sir Matthew Hale saying that probably many laws that now obtain merely as Common Law would appear to have been at first statute laws or Acts of Parliament. I think it would be safe to say that from the days of the revival of Roman studies and the compilation of the Corpus Iuris Canonici in the twelfth century, the French legal mind has not been hospitable to the conception of a body of unwritten customary law from which statutory enactments are distinguished as islands from the sea surrounding them. The task of codifying the provincial customs began under Saint Louis (1215—1270); and the custom of Paris had been codified twice over before the Revolution. Napoleon's Code was remarkable, not because it was a Code, but because it was a Code for the whole of France. But interpretation was of course always going on, and the activity of the *Parlements* in this sphere had been sufficient in the years preceding the Revolution to excite the conscious hostility of reformers. As Planiol says, 'the men of the Revolution were persuaded that written law could and should be all-sufficient, and that the

jurisprudence of the Courts was the most detestable of institutions and deserved to be destroyed.'

It is easy to appreciate, in these circumstances, that the notion of a rivalry between Common Law and Statute Law is, or at any rate was, completely foreign to the French legal mind. I think it is true to say that in England or America when a judge or counsel finds himself faced by a statute, he instinctively performs a species of mental gesture, such as one does on the drill-ground when one stands to attention or slopes arms: he makes an appropriate and specific adjustment of his mind, very much as a common lawyer does when he finds that he has strayed into the domain of equity. Now I am persuaded that a French judge or counsel does nothing of the kind. The most recent and unfamiliar statute is for him a phenomenon of a similar character to an article of the Code, it is *par materia*—saving only that the Code has been the subject of a great body of commentary, both judicial and doctrinal.

It is true that there is considerable literature in French upon the subject of interpretation and judicial logic. But in this literature little emphasis is placed, I think, upon the distinction between Codes and other laws; and again this literature is rather philosophical than what I may call doctrinal in character. These books are not law books, to be relied upon in forensic argument; they bear the same relation to practical legal reasoning that disquisitions upon the nature of mathematical truth do to the actual solution of a quadratic equation. There are no books in French corresponding to Maxwell or Craies.

For this last significant fact there are several explanations; but they all come down, I think, to one central fact, and that is that Continental law, whether French or German, is much less verbal in spirit than is English law. To quote again my Italian friend of whom I spoke at the beginning of this lecture, for the Continental jurists *words are not things*. Two facts are sufficient to illustrate this truth. The first is the familiar one that Continental Courts attach great importance to preparatory material—to the reports and debates which throw light upon the purpose and policy of a law; and the second is the remarkable circumstance that there exists on the Continent singularly little literature on conveyancing or company or other precedents. Such a publication as the Encyclopaedia of Forms and Precedents is completely unknown. It is difficult to explain this circumstance except by saying that it represents a different stage of legal evolution, a different psychological attitude, and a different conception of the nature of legal prescription and of the duty

of the interpreter from ours. The draftsman, whether of a will, of articles of association, or of a law, does not regard himself as a general disposing his troops for a frontal attack upon a hostile position, but as one who is bringing up reinforcements to an ally. A nod is as good as a wink to a friendly Court.

But let me say in conclusion that I think that the appearance of rigorous formalism in our own theory of interpretation of statutes is perhaps to some extent illusory. Many modern examples can be found of the judges making a statute say what they thought it ought to have said. Let two suffice. In *Salmon* v. *Duncombe* [16] a Natal Ordinance had empowered any British subject resident in Natal to dispose by will of real and personal property according to English law 'to all intents and purposes as if such natural-born subject resided in England.' The effect of those last words was to nullify the Act, as regards a person domiciled in Natal; and the Privy Council treated them as '*non scripta.*'

In *R.* v. *Vasey* [17] an indictment for poisoning a salmon river was upheld, although, in order to do so, it was necessary for the Court to bring the most energetic goodwill to the aid of a very carelessly drafted statute, which purported to amend a previous statute by inserting words in an impossible place.

There is no doubt that judges, like other men, are greatly governed by their innate or acquired intellectual temperament; and it has been well said that the distinction between men who are Aristoteleans and those who are Platonists by mental bias holds good even in the technical field of the interpretation of the laws. The rules of construction are very far from operating as an impersonal machine, compelling one solution and rendering another impossible of adoption; and there is even some room for the speculation that many of the cases are reported, and the text-books written, not so much to meet a demand for cast-iron legal certainty, as to provide counsel with something to say.

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[16] (1886) 11 App. Cas. 627.
[17] [1905] 2 K. B. 748.

# THE MEASURE OF DAMAGES IN CONTRACT AND TORT.

S. L. Porter.

## I.

THE determination of the true measure of damage in any individual case is seldom easy. It depends upon considerations of causation, and causation is primarily a matter for philosophic rather than legal inquiry. Hume was not prepared to adopt the ordinary conception of causation. 'It were infinite for the law to judge the causes of causes and their impulsion one of another,' said Bacon. In a modern case the same thought has been expressed in the words 'Causation is not a chain but a net.' Faced with metaphysical uncertainty the lawyer must find some base on which to build his structure, and he does it by following the course of the pragmatist and asking of any particular decision: Does it work? If it does he has to fit it into a scheme which should be consistent with a number of other decisions which also work, but are not always governed by the strict rules of logic.

This combination of authority founded upon, and itself a foundation for, principle necessarily and inevitably gives rise to much divergence of opinion as to the true principle to be deduced from certain cases or groups of cases some of which have reached the House of Lords, but others of which, though they have not been determined by the final tribunal, are of such long standing and so often quoted that their authority is almost equal to the decisions of that body. It would shock a lawyer to hear that the principle of such cases had been overruled.

One such is *Hadley* v. *Baxendale* (1854) 9 Ex. 341, the leading case on the measure of damages in an action of contract, behind which it is generally thought unnecessary to penetrate.

No one, I think, now suggests that the principles of that case have been overruled by anything which was said in *Polemis* v. *Furness Withy* [1921] 3 K. B. 560, but it has been thought by some lawyers that the rule in *Hadley* v. *Baxendale* has been

modified in some respects by that decision. *Polemis* v. *Furness Withy* enabled a discussion to be raised as to the true measure of damages for negligence both in contract and in tort. Under the judgment of three arbitrators, one judge and three lords justices it was determined that when ascertaining whether an act is negligent or not it is material to consider whether a reasonable man would anticipate the possibility of damage, but in ascertaining the amount of damages recoverable all damage which physically results from the negligent act must be taken into consideration, whether it would reasonably have been anticipated or not.

I do not myself see that there is any necessary analogy between the principles to be considered in proving actionable negligence and those to be considered in estimating the amount of damage resulting from such negligence and, if the matter were at large, I imagine a Court might as well adopt the one rule as the other. If it chose to say that once negligence is established all consequential loss is recoverable I do not see why it should not do so without shocking the sensibility of mankind and I cannot but feel—indeed it is apparent from the discussion which the decision has already provoked—that the real ground of complaint of the decision in *Polemis* v. *Furness Withy* is, not that apart from authority the decision itself is inherently wrong, but that it is inconsistent with *Hadley* v. *Baxendale*.

In any case where negligence is asserted, the first and easiest question is whether the act said to be negligent has been done by the defendant; the second and more difficult question is whether the act was negligent. Unless the defendant be held liable to make restitution for doing the act whether negligent or not, proof of negligence is essential to liability, and I know of no method of ascertaining whether the defendant was negligent except to ask the question: Could a reasonable man have foreseen the result of the act? But it does not therefore follow that the damage caused by the negligence is to be confined to what the defendant could foresee. Logically it is possible to hold that all consequences are to be answered for; indeed, all consequences might include all consequences whether directly or indirectly following from the negligent act.

In this country, however, it has long been determined that a defendant is only answerable for the direct consequences of his act; all indirect consequences are too remote. But physical consequences occurring without intervening cause are in one sense at any rate the direct though they may be the

unexpected result of the act, *e.g.* a blow which in one case might lead to slight discomfort may in another case lead to death, and the doer must suffer the direct consequences of his act, provided it was negligent, whether he could have foreseen them or not. If I, driving a motor car on the public highway, see a man shabbily dressed crossing the road, negligently strike and kill him and he turns out to be a millionaire, it is idle to say that I took him to be a tramp. The damages I may have tc pay are for the loss of a millionaire not for the loss of a tramp, however reasonable from his romantic appearance my belief in his poverty may have been. Clearly, then, I cannot escape the larger liability because I could not foresee that the damage would be so great. One explanation of such a result no doubt is that damage of that type can be foreseen though the amount may be unexpected. You do not escape liability because the amount of damage was greater than you could have supposed, but though you must pay for all the damage, however great, of the type which you ought to have foreseen, it does not follow that you must pay for damage of a type unforeseen and unforeseeable. Apart from authority it is, I think, this aspect of the case which offends the instincts of those who regard the decision in *Polemis* v. *Furness Withy* as unsound. A man knows or ought to know that he will cause a particular kind of damage if he is negligent, but he cannot foresee that he will cause a type of damage which would not have presented itself to any reasonable mind. He is a wrongdoer: shall he or the injured party suffer for that unforeseen damage? That is, I think, the problem which we have to solve. *Polemis* v. *Furness Withy* says he must pay. Is there any reason in justice or logic why he should not do so? The question after all is a matter of expediency. Expediency cuts down the damages recoverable to direct damage, often to the prejudice of the person wronged. Expediency may or may not require that a man should pay for a type of damage he could not have foreseen. Either result has advantages and either result may do some injustice. I cannot feel that the question can be resolved by such considerations as these. When the law might take either course with at least equal justice it only remains for the lawyer to consider that which indeed he must consider in any case: What principles has the law laid down which shall guide him in making his choice between the two views?

The problem as originally apprehended raised a controversy as to the principles applying to damages in the case of both contract and tort. More recently it has been suggested that

the decision must be accepted as applying to cases of tort but as being inapplicable to cases of contract.

I should wish myself to consider first and briefly the wider aspect.

The argument against the decision may, I think, be summed up as follows: It is not now necessary to go behind the decision in *Hadley* v. *Baxendale,* since that case puts succinctly and accurately the measure of damages recoverable at any rate in actions of contract, and damages recoverable in actions founded on tort do not differ in principle from those recoverable in actions of contract. The damages recoverable in either case (apart from the special considerations applicable where special circumstances are known to both parties, considerations which have no bearing on the case of *Polemis* v. *Furness Withy*) are only those arising naturally from the act complained of and 'naturally' means 'according to the ordinary course of things,' *i.e.* such as a reasonable man could foresee. Therefore on the finding of the arbitrators the loss of the *Thrasyvoulos* in the *Polemis Case* was not the natural result of the act of negligence caused by knocking the beam into the hold, whether that act be regarded as a breach of contract or as a tort.

Later on it will be necessary to discuss the question whether the damages given in *Polemis* v. *Furness Withy* were recoverable in contract. For the moment the inquiry may be confined to actions founded in tort.

So far as tort is concerned expressions of opinion occurring in more than one case decided before *Polemis* v. *Furness Withy* indicate that all damages which are physically the direct result of an act of negligence are recoverable under English law.

This view is expressed in terms by Channell B. and Blackburn J. in *Smith* v. *L. & S. W. Ry.* (1870) L. R. 6 C. P. 14, and I cannot find that any of the judges concerned in that case disagreed with their conclusions. Since the decision of that case the same view was expressed by Evans P. in *H.M.S. London* [1914] P. 72. At p. 78 he says:—

> 'It would seem to me that a loss or damage which is clearly the direct and immediate consequence of a wrongful act is always proximate, and that no further inquiry is really necessary. In the present case the loss of the use of the vessel for the whole period while she was in dry dock, including the period of the strike which occurred while she was there, was clearly directly and immediately due to the defendants' negligence which made it necessary for her to go for repair; and damages for the loss of the use of the

> vessel for that whole period is [? are] therefore not too remote. But if it be necessary to inquire and ascertain that the loss or damage flowed not only directly and immediately but "directly and naturally, or in the usual or ordinary course of things" in order to make the damage recoverable, in my opinion the loss and the damages claimed which are now in dispute did so flow in this case.'

At the moment I do not quote Lord Sumner's words in *Weld-Blundell* v. *Stephens* [1920] A. C. 956, at p. 984, because though they support the same view, they were spoken in a case of contract and are more germane to the later stages of this paper.

Against these opinions one has to set in the forefront the views of Pollock, C.B., in *Rigby* v. *Hewitt* (1856) 5 Exch. 240 and in *Greenland* v. *Chaplin*, *ibid.* 243, and the words of Vaughan Williams L.J. in *Cory* v. *France* [1911] 1 K. B. 114, at p. 122.

It is noteworthy that in the first two cases the Chief Baron is careful to say that he is expressing his own views only and to indicate that the other members of the Court took the view that once negligence is established the defendant is liable for all the consequences of that negligence.

It appears from the report in 19 L. J. Ex. 291, 293 that the other members of the Court who heard the appeal in *Rigby* v. *Hewitt* were Parke, Rolfe and Platt BB., and that in *Greenland* v. *Chaplin* they were Rolfe and Platt BB.

So far as *Cory* v. *France* is concerned the question at issue was –Did the injury to the workmen arise from the negligence of the defendants or was there some intervening cause, breaking (as the phrase is) the chain of causation? If there was, then the damage was not the result of the defendant's act but of that intervening cause, since there was no direct physical connexion between the negligent act of the defendant and the damage suffered by the workmen; there was another act of negligence between the two.

'In considering what is a proximate cause you may have to ask the question which was asked in *Greenland* v. *Chaplin* and *Rigby* v. *Hewitt*, namely, was the negligence which was proved against the defendant of such a character that the consequences which followed might reasonably be expected to result under ordinary circumstances from such misconduct?' These were the words used by Vaughan Williams L.J. at p. 122, and the object of the question is plain if the judgment of Kennedy L.J. be looked at on p. 133, where he refers to *Clark* v. *Chambers* (1878) 3 Q. B. D. 327. If *Greenland* v. *Chaplin*

and *Rigby* v. *Hewitt* be merely instances of what is or what is not the proximate cause of the injury suffered they have little bearing on the principle enunciated in *Polemis* v. *Furness Withy*.

In addition to these cases there are a number of decisions in which the point at issue in *Polemis* v. *Furness Withy* did not arise, but in which general *dicta* are to be found on the one hand to the effect that the probable consequences alone, and on the other hand that all the consequences, are to be considered. I have not attempted to discuss or analyse such cases, since general expressions used where accuracy is not required for the decision of a case are of little value.

But two criticisms of the principles laid down in *Polemis* v. *Furness Withy* call for notice, *i.e.* that of Sir Frederick Pollock in 38 L. Q. R. 165, and in the 13th edition of his book on Torts, pp. 32—41, and that of Professor A. L. Goodhart in Cambridge Legal Essays, p. 101, under the title 'Liability for the consequences of a negligent act.' (Reprinted in the learned author's 'Essays in Jurisprudence and the Common Law,' 110—128.)

Sir Frederick Pollock's views are shortly expressed in his article in the Law Quarterly and are founded on principle and authority. His argument on principle is the argument 'ab inconvenienti'—How undesirable it is to have to determine what is meant by elusive words such as direct or proximate when it is possible to avoid the difficulty by saying that a man shall only be liable for what he ought to have foreseen! But causation, even if accompanied by the adjectives 'direct,' 'proximate,' and so forth, is not confined to negligence or to tort, and is not to be disposed of by its simplification in negligence cases.

His authorities are *Sharp* v. *Powell* (1872) L. R. 7 C. P. 253, and *Cox* v. *Burbidge* (1863) 13 C. B. (N.S.) 430.

The former has, I suggest, been rightly explained by Lord Sumner in *Weld-Blundell* v. *Stephens* [1920] A. C. at p. 984 in the words:—

> 'Again what ordinarily happens, or may reasonably be expected to happen, is material where a mere series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly. Such a case is *Sharp* v. *Powell*, unless indeed it be regarded as a decision on negligence or no negligence.'

Indeed, it is difficult to see in the case of *Sharp* v. *Powell*, if the action was founded on negligence, in what respect the defendant had been negligent toward the plaintiff, and if in nuisance

in what respect the defendant caused the nuisance from which the damage flowed. That nuisance was rather the result of a blocked drain and a severe frost.

*Cox* v. *Burbidge* was an action founded upon negligence. The horse, it is true, was a trespasser on the highway, but for such a trespass the plaintiff had no grounds of complaint. The decision was merely that there was no negligence towards the plaintiff and indeed there was no evidence of negligence at all.

Professor Goodhart's paper goes into the foundations of liability in tort in addition to considering the measure of damage in negligence cases. I can only glance at his reasoning which seems to be as follows:—

The part of his argument with which we are concerned starts with a criticism of *Smith* v. *L. & S. W. Ry.* on the ground that, as Professor Terry had already pointed out, an act cannot be negligent at large, but can only be negligent because it is the breach of a duty towards some person and that the person in regard to whom the act is negligent alone can recover; that even if it be conceded that the injured party can recover for all physical consequences of an act negligent in regard to him, yet the plaintiff in *Smith's Case* could not rely upon the negligence alleged because the defendants could not have foreseen any damage to the plaintiff's house and therefore, so far as the plaintiff was concerned, were not negligent. For the purpose of this paper I accept the proposition which is still, I think, the law of England, that actionable negligence only exists where the defendant owes and fails in a duty towards the plaintiff, and therefore there seems force in the criticism. But the point was not argued and the omission to decide it touches but little the weight of the *dicta* in the case just as it touches one or two words in Scrutton L.J.'s judgment in *Polemis* v. *Furness Withy*, words which were not material to that decision.

But Professor Goodhart's main argument is that one cannot accurately speak of an act as negligent apart from its consequences: one can only speak of it as negligent because its consequences should have been foreseen. Similarly he says one cannot speak of an intentional act; one can only speak of an act as intentional because its consequences were intended. An act therefore may be negligent as to one consequence and not negligent as to another, just as an act may intend one consequence and not intend another. For the purpose of his argument one may assume that intentional act means an act intended to produce certain consequences, but even so, is not the difficulty still left where it was? An act may be a tort because the doer

intended a particular injury or class of injuries—it does not follow that once the tort is established he is liable for the intended injury only; an act may be negligent because a particular injury or class of injuries should have been foreseen—it does not follow that the doer is liable for those injuries only. To speak of an act as negligent as to certain consequences and not as to others is surely to beg the question. Is not the more accurate expression to say that an act is negligent because one can foresee certain consequences? Once that negligence is established the further question arises, 'shall the injured party only recover for those consequences which should have been foreseen, or can he recover for all consequences which are not otherwise too remote?' The question is not solved by alleging that the act is tortious because one result should have been foreseen whereas the damage was a result which could not have been foreseen. These may well be separate and independent questions and, if they are, the fact that some damage must be foreseeable in order to constitute the tort of negligence is no ground for saying that the damage recoverable is confined to that which should have been foreseen.

Damage indeed may be caused by an act though no injurious consequences could have been foreseen.

The act is not negligent, but the damage is its consequence. Those damages could not be recovered, not because they are too remote, but because the doer has not been negligent or not negligent towards the person seeking to recover. A walks over my floor which breaks under his weight. He has no reason to suspect that it would not bear him. He is not negligent and I cannot recover, yet the breaking of the floor is the consequence of his walking on it. B drops his clock on my floor; he should have foreseen damage to his clock, but not to my floor. I cannot recover because he has not been negligent to me, yet the damage to my floor is the consequence of his act. C drops my clock on my floor. He should have foreseen damage to my clock, but not to my floor. The direct consequence of his act is to cause two separate injuries, (i) to the clock, which he should have foreseen, (ii) to the floor which he should not have foreseen. Both are the consequence of his negligent act. By common consent I can recover for the first. Why should I not recover for the second, though it be the unexpected consequence of the negligent act, and why should I not recover for the damage to the floor if it was the only consequence of the negligent act, since in not avoiding an act which might cause damage he has been guilty of a breach of duty towards me, though he could

not expect that that act would cause the damage actually sustained?

If, however, I follow Prof. Goodhart's meaning aright he draws some analogy between negligence towards a person and negligence in respect of a consequence, and seeks to say that just as damages cannot be recovered by a plaintiff in respect of an act which is not negligent towards him because no harmful consequences to him could be foreseen, though the act may be negligent towards others because harmful consequences could have been foreseen towards them, so damages should not be recovered for harmful consequences to the plaintiff which should not have been foreseen, though other harmful consequences to him might have been foreseen by the doer of that act.

So stated I doubt the analogy; nevertheless it requires consideration because one can visualize some unexpected consequences which may arise from holding on the one hand that no damages are recoverable unless there be an act of negligence towards the plaintiff and on the other that all direct physical damages can be recovered in respect of an act negligent towards him.

One example must suffice: If I am asked by a friend to place his tumbler carefully on the table of a furnished house of great value and fail to do so, so that the tumbler falls from the table, and if below the table at the place at which the tumbler falls there happens to be something which will cause a spark and some combustible material the existence of which at that place neither he nor I knew or could know, then, if the house and furniture be burnt, I would appear to be liable for all the damage, provided the house and furniture were his, but for the value of the tumbler only if the property belonged to someone else. I owe a duty both to my friend and to the owner of the property. Towards my friend I have been negligent; I have broken or might have broken his tumbler. If someone else own the property I have not been negligent towards him, because I could not foresee any damage to him. My friend therefore can recover all the physical consequences (including the burning of the house and furniture if his) which follow my negligent act, but if a stranger owned the house and furniture, there is no negligence towards him and therefore no act of mine for which he can recover.

I cannot help feeling that a Court would try to find some method of avoiding such a result, but logically I find a difficulty in seeing how it would achieve its end.

Perhaps the decision must wait until the event occurs.

The same practical difficulty is presented by Prof. Goodhart in another way. Suppose, he says, that instead of containing an exception of fire the charterparty in the *Polemis Case* had contained an exception clause as to negligent injury to the structure of the ship by means other than fire but had not excepted fire caused by negligence; there would then be no negligence because damage to the structure of the ship otherwise than by fire would not be actionable negligence, and as damage other than damage by fire alone could have been foreseen, there was no actionable negligence at all.

The case suggested does not, I think, present any greater difficulty than that illustration already given, but is a further example of the results which may follow.

The fire is a consequence and not a cause; the act which gave rise to the damage was the knocking of the board into the hold.

If that was not negligent in English law because under our system negligence means actionable negligence (see *Dreyfus* v. *Tempus Shipping Co.* [1931] A. C. 726), then there was no negligence for which the plaintiff could recover. A contract, however, with so curious an exception might well give rise to so curious a result.

## II.

If I am wrong in thinking that *Polemis* v. *Furness Withy* was rightly decided where the cause of action was laid in tort, I know of no reason or authority which would lead me to suppose that it was rightly decided in contract.

But if I am right in my contention that in assessing damages for tort the principle of the decision was correct the question still remains—Does that principle apply also to contracts?

Undoubtedly the view that the measure of damages in contract differs from that in tort is widely held. Not only has it the support of Dr. McNair's paper 'This Polemis Business' (4 *Camb. Law Journal* 125—145), but Beven on Negligence (4th ed. 1928) and Sedgwick on Damages (9th ed. 1913), amongst the more prominent text-books, support the same view. These are weighty authorities and require careful consideration. Sedgwick founds himself upon general principle before considering whether the authorities support his proposition. At p. 261, sect. 141, he says that the obligation to use care in matters of tort is imposed by the general law, whereas the contractual relation is voluntary; and he continues:—

'a just rule therefore would put upon a person who commits

a tort the risk of all proximate consequences of his wrong, but upon him who breaks a contract such risk as he could have foreseen when he undertook the duty, and this appears to be the conclusion of the law.'

But is the rule necessarily just? One might, I should have thought, as readily transpose the wording of the statement and say one who commits a tort has the obligation to be careful imposed upon him by the general law, and therefore should be subject only to liability for damage which he can foresee as likely to follow from his negligence, whereas he who breaks a contract voluntarily exposes himself to a risk he need not have undertaken and therefore should incur all the proximate consequences of his voluntary act.

Indeed, if they had to make a choice between these two views some minds might think the latter the more just rule, but probably it is fairer to say that in principle there is no valid ground for imposing a stricter rule as to the ascertainment of damages when one is considering contract than is applied when one is considering tort.

Apart from considerations of general principle both writers support their contentions by authority. In addition to *Hadley* v. *Baxendale* Beven refers to *The Notting Hill* (1884) 9 P. D. 105, at p. 113. I return to a consideration of *Hadley* v. *Baxendale* later; *The Notting Hill* is a case not of contract but of tort; moreover, it contains the *dictum* of Lord Esher that damages in the case of breach of contract do not differ from the damages in the case of tort. Of course, if unforeseeable damage is irrecoverable in an action of tort and if damages in contract do not differ from damages in tort, unforeseeable damages would not be recoverable in a case of contract. But Beven's argument is that unforeseeable damage is recoverable in case of tort, and if Lord Esher's *dictum* be true it would appear from *The Notting Hill* that it is recoverable also in cases of contract.

Perhaps a stronger case in support of this contention is *Hobbs* v. *L. & S. W. Ry.* (1875) L. R. 10 Q. B. 113, the *dicta* in which support the view that the damages recoverable are the damages contemplated and those only. But the question in that case, as in *Cory* v. *France,* was 'has the chain of causation been broken?' not 'did the damage physically but unexpectedly follow the act?' The damage could only be direct if it should have been foreseen; there was no direct physical connexion between injury and damage.

Where, as in such a case, damage is the result not of the physical act but of some further circumstance the question

always must be—Should the further circumstance have been present to the mind of the wrongdoer as a possible consequence of his act?

Perhaps the reason why the question of foreseeability bulks more largely in contract than in tort is because in contract the damage suffered is less frequently the direct physical result of the defendant's act than of some further circumstance acting independently of either party, *e.g.* a rise of price.

Both writers seem ultimately to base their view upon an exact reading of the wording of *Hadley* v. *Baxendale*, though so far as American law is concerned Sedgwick reinforces his understanding of that wording by quoting a number of American authorities of which the leading case (*Griffen* v. *Colver* (1858) 16 N. Y. 489) contains the words:—

> 'The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed. The familiar rules on the subject are all subordinate to these. For instance; that the damages must follow directly and naturally from the breach of contract, is a mere mode of expressing the first: and that they must be not the remote but the proximate consequences of such breach, and must not be speculative or contingent are different modifications of the last.'

If this wording be accurate and universal in its application the contention that damages which could not be foreseen are irrecoverable in contract would seem to be established, but every case must be considered *secundum subjectam materiem* and the facts of *Griffen* v. *Colver* did not require so wide or general a statement. Indeed the facts were not dissimilar to those in *Hadley* v. *Baxendale*, and this statement of principle is only the Court's gloss upon that case; a gloss which is placed upon it by reading the word 'natural' as equivalent to 'probable' or 'such as might be expected.'

When we come to grips with the problem the ultimate authority is still the judgment in *Hadley* v. *Baxendale*. 'General damages to be recoverable must be such as may fairly and reasonably be considered either as arising naturally, *i.e.* according to the usual course of things from such breach of contract itself, *or* such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.'

What, then, does 'arising naturally, *i.e.* according to the usual course of things,' mean? It is noticeable that in the judgment the words 'directly' or 'proximately' are not to be found. The right of recovery is stated to arise in two cases: (1) where the loss happens naturally, *i.e.* according to the usual course of things from such breach of contract itself, and (2) where the loss is such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If, as *Griffen* v. *Colver* appears to say, the meaning of these two rules is that in cases of contract only what the parties might reasonably contemplate is to be recovered, I cannot see why the principle should be expressed in two rules and not in one. If 'naturally' means such as may reasonably be supposed to have been in the contemplation of the parties, the second rule is otiose; but if 'naturally' means directly or proximately or without the intervention of some further act, then the limitation of damages to direct consequences is assured, while scope is given for the recovery of damages which the parties contemplated or must be taken to have contemplated and which the breaker of the contract must therefore be taken to have agreed to bear, whether or not those damages would strictly be considered proximate if the contemplation of the parties was not to be considered.

To this suggested explanation I can imagine the objection that one would not expect the word 'natural' to be used when 'proximate' or 'direct' is the obvious adjective.

There is some ground for this criticism, even in the judgment in *Hadley* v. *Baxendale* itself. Actually the expression 'natural' is not very satisfactory either to express 'proximate,' *i.e.* without intervening cause, or such as would reasonably be contemplated. Yet it appears to have been used in both senses.

Sedgwick on Damages (9th ed. 1913), at p. 193, devotes a considerable space to the discussion of the meaning of 'natural,' and accepts the view that it denotes the expected. He says:—

> 'If a loss is sufficiently near the wrong for the law to concern itself with the connexion it is called a proximate loss; if not sufficiently near it is called a remote loss; both proximate and remote losses being consequential.
>
> 'Still further, a result may be the consequence that might naturally be expected to follow from the wrong or it may be quite unexpected. Consequences of the expected sort are called natural consequences.'

For this statement he quotes *Smith* v. *Green* (1875), 1 C. P. D. 92 *per* Grove J. at p. 96:

> 'Great difficulty no doubt arises from the use of the word "*natural*" in these cases. It is used by Lord Campbell in *Randall* v. *Raper* (1858) E. B. & E. 84 and has been used in many cases. Normal or likely or probable of occurrence in the ordinary course of things would perhaps be the more correct expression.'

There are other instances in which 'natural' is undoubtedly used as a synonym for 'to be expected,' but I doubt whether Grove J. means more than that the loss was proximate. Certainly Lord Campbell C.J., who in *Randall* v. *Raper* used the words 'probable, natural or necessary consequence,' had already expressed the quality of expectation in the word 'probable' and seems to use 'natural' in the sense of proximate or direct.

But the fact is that judges like the rest of us are human and, where for a particular decision accuracy is not essential, will use several words in the same sense or one in several. It is not by pressing the meaning attributed to a word in one or two instances that its true definition can be obtained. An examination of Lord Sumner's judgment in *Weld-Blundell* v. *Stephens* [1920] A. C. at p. 983 will show that in his opinion the expression 'natural, probable and necessary consequences,' whether the adjectives be used separately or in conjunction, means no more than 'direct consequences.' It is true that in the same passage he explains that the word 'natural' cannot bear its widest sense, since, as he says, 'everything that happens happens in the course of nature.' But the limitation of meaning so imposed is to exclude intervening acts and so make 'natural' equal 'direct.' He shows no sign for confining it to the expected. Might one not fairly ask, could the damage sustained by the *Thrasyvoulos* be described as the unnatural consequence of the fall of the beam because that consequence was unexpected?

I doubt also whether the statement that, in the case of damages contemplated by the parties, only damages which are direct as well as contemplated are given, is accurately expressed.

Indeed I doubt whether a distinction between what is proximate and what is contemplated can rightly be drawn in all cases.

Were they not contemplated, certain damages would not be direct—they are direct only because they are contemplated.

All damages must be proximate, but they may be proximate for either of two reasons: either because they arise without intervening cause, or because they should have been contemplated.

'Direct' is not limited to results which follow physically

without any intervening act. It includes also such results as a reasonable person could be expected to foresee in the absence of special circumstances. But the fact that it includes the latter is no reason for confining it to them.

There is of course a third case in which damages are recoverable in contract, damages similar to but extending beyond those which should normally be foreseen, *i.e.* those cases in which the damages recoverable include exceptional damage which the particular parties to the contract could visualize as likely to result from its breach because they were aware of special circumstances which might give rise to that damage.

But this is an additional and special case, and is specially treated in *Hadley* v. *Baxendale.*

Apart from the cases already discussed, there are some indications in *Polemis* v. *Furness Withy* itself which support the view that it determines the principle on which damages are to be given in contract as well as in tort. They may be summarized as follows:—

(1) The action was founded both in contract and in tort.

(2) The point was raised in argument on behalf of the appellants in the Court of first instance ( (1921) 26 Com. Cas. 281 at p. 284).

(3) The point was again raised in the Court of Appeal (see (1921) 27 Com. Cas. 25 at p. 27).

Moreover the question has been discussed in cases both before and after the decision of that case, and its principle has been accepted in actions of contract: see *Weld-Blundell* v. *Stephens* [1920] A. C. 956, *per* Lord Sumner at p. 984, and *Hambrook* v. *Stokes* [1925] 1 K. B. 141, where Atkin L.J. approved the decision at p. 157 and Sargant L.J. at p. 164 confined its results to contract.

It is true that in *The Edison* [1933] A. C. 449, 461, Lord Wright speaks of *Polemis* v. *Furness Withy* as a case of tort, but he puts the principle upon which the plaintiffs were entitled to recover as dependent on the fact that the damages were the immediate physical consequences of the negligent act.

One may add that to the practical lawyer it would be inconvenient, and to the layman, I imagine, incomprehensible, that the same act should give rise to a totally different measure of damages according to whether the cause of action could be founded in contract or in tort.

The principle adopted by the Court is, in its widest aspect, to be found in Aeschylus and was old before his time. 'The doer must suffer,' or, as an American authority has it, 'there

is an idea back of this conception that has actual relation to the facts of life and the needs of the Court in affirming responsibility to human acts. The idea is that the man who starts something should be responsible for what he has started.' The Aeschylean phrase is shorter and, it may be, preferable. In English law both statements must be limited to the consequences of a wrongful act, but not, in my view, to those consequences only which should have been foreseen.

Authority is at least not adverse—not even, I think, the decision in *Hadley* v. *Baxendale*.

Is not the true explanation that that decision contemplates three possible cases in which the wrongdoer, be he a tortfeasor or a breaker of contracts, shall suffer?

(1) Where the damage is the natural—*i.e.* physically—the direct result of the wrongdoer's act.

(2) Where a reasonable man ought to have foreseen the damage which was caused.

(3) In contract, where owing to circumstances known to both parties, both parties ought to have foreseen the results which actually occurred, though if those circumstances had been unknown the damages would have been too remote.

# RESCUE AND VOLUNTARY ASSUMPTION OF RISK.

A. L. Goodhart.

IN *Mills* v. *Armstrong*[1] Lord Bramwell, in commenting on the judgments in *Thorogood* v. *Bryan*, said: 'At present I will only observe that the four judges were great lawyers, and I believe that an experienced lawyer may be, as it were, instinctively right without at the moment being able to give a good reason for his opinion.' Although such intuitive judgments[2] may be satisfactory as doing justice between the litigants in a particular case, there is always the danger that they may prove to be misleading from the standpoint of the further development of the law, for it is natural to assume that as the judge has reached conclusion X by means of reason Y, therefore if conclusion X is correct then reason Y must be correct also. In future cases reason Y is accepted without further consideration because it has in the precedent case apparently led to a desirable result, even though, in fact, there may be no valid connexion between the reason given and the result. It may be suggested with all respect that the recent case of *Cutler* v. *United Dairies (London), Ltd.*[3] may in the future have such an effect on the development of English law for, although the conclusion reached in it is obviously just and in accordance with established law, nevertheless some of the reasons advanced by the Lords Justices in support of their judgment are of doubtful validity, and may, if accepted apart from the facts of the particular case, lead to unfortunate results.

The facts can be stated briefly. The plaintiff, who was staying at Shepperton, saw from his house a horse and cart, belonging to the defendants, galloping past without a driver. Being apprehensive about his children he went into the garden where they were playing. By this time the horse was stationary in a field adjoining the garden, but separated from it by a fence, and the driver was trying to pacify it. He shouted 'Help,

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[1] (1888) 13 App. Cas. 1, 12.

[2] For a similar view see Judge Joseph C. Hutcheson's widely quoted article, 'The Judgment Intuitive—The Function of the "Hunch" in Judicial Decisions,' in the April (1929) Cornell Law Quarterly.

[3] [1933] 2 K. B. 297.

help,' and the plaintiff got over the fence to hold the horse's head although he 'had no great knowledge of horses.' The horse reared and knocked him down, injuring him. Evidence was given that the horse had bolted twice previously. The trial judge asked the jury: (1) 'Did the plaintiff freely and voluntarily, with full knowledge of the nature of the risk he ran, impliedly agree to incur it?' Answer: 'No.' (2) 'Were the defendants guilty of negligence in employing the horse to draw the van?' Answer: 'Yes.' (3) 'Was such negligence the cause of the accident?' Answer: 'Yes.' Judgment having been entered for the plaintiff, the defendants appealed.

In allowing the appeal Scrutton L.J. based his judgment on two grounds: (1) this was a case of *volenti non fit iniuria*, and, (2) assuming that the defendants were negligent in employing a horse that was likely to bolt, the voluntary action of the plaintiff was a new intervening cause and therefore it could not be said that in law the negligence was the cause of the accident. These conclusions he illustrated by the following example in which the peculiar interest of the case lies, for the example goes much farther than the actual facts of the case. The learned Lord Justice says[4]:

> I start with this: A horse bolts along a highway, and a spectator runs out to stop it and is injured. Is the owner of the horse under any legal liability in those circumstances? On those facts it seems to me that he is not. The damage is the result of the accident. The man who was injured, in running out to stop the horse, must be presumed to know the ordinary consequences of his action, and the ordinary and natural consequence of a man trying to stop a runaway horse is that he may be knocked down and injured.

Does the maxim, *volenti non fit iniuria*, apply to this moot case?

Although most of the cases concerning voluntary assumption of risk, to use the English term which is as short and more lucid than the Latin phrase,[5] have dealt with the master and servant

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[4] At p. 303.

[5] For the four different and distinct classes of cases covered by this maxim see Salmond on Torts (7th ed.) p. 62. They include actual consent, implied consent, knowledge by the plaintiff negativing negligence on the part of the defendant, and contributory negligence. In *Yarmouth* v. *France* (1887) 19 Q. B. D. 647, 653 Lord Esher M.R. in speaking of this maxim said: 'I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them. I do not doubt that, if we put this maxim into plain English, part of it is true. . . . But, does the maxim *Volenti non fit iniuria* go this length, that the mere fact of the workman knowing that a thing is dangerous, and yet using it, is conclusive to show that he voluntarily incurs the risk?'

relationship, and are therefore contractual in nature, the doctrine is not confined to relations created by contract. The suggestion that there is an implied agreement in all cases tends to hide the true basis of the rule, an unfortunate result which frequently follows when legal fictions are employed. As Professor Bohlen has said [6]:

> It is, on the contrary, an incident inevitably attached by law to all relations and associations, contractual or otherwise, which are voluntary upon both sides. The plaintiff's actual consent to run the risk is immaterial; . . . if of his own free choice he chooses to enter into association with the defendant, he must *perforce* accept the risks obviously inherent therein, no matter how strongly he protests against them, or how emphatically he expresses his unwillingness to run them.

To this general rule there are, however, a number of important exceptions in which it has been held that the voluntary encountering of an obvious and appreciated danger does not involve an assumption of the risk of the resultant injury. Professor Bohlen in a careful analysis has divided these into eight separate classes [7] which it is unnecessary to discuss here, but the following cases show how far the English Courts have gone in recognizing these exceptions. The first among the exceptions is the classic case of *Clayards* v. *Dethick*,[8] where a livery stableman was held entitled to take the risk of leading his horse over a trench wrongfully dug by the defendant in front of his stable. In *Rose* v. *North Eastern Ry.*[9] a passenger descended from his carriage which had stopped beyond the platform. Cockburn C.J. said:

> If the passenger is satisfied that the train is going on, and there is apparently no alternative but to get out, he must do as best he can. Of course, if he is careless in getting out and is thereby injured, it is his own fault, but if he does his best and yet sustains injury, the company will not have done what was incumbent on them to do, and will be liable.

In *Thrussell* v. *Handyside* [10] the plaintiff was directed by his employer to work in a particular place on the floor of Olympia. The defendants, a separate firm of contractors, were doing work on the roof which made the place dangerous unless proper

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[6] Francis H. Bohlen, Studies in the Law of Torts (1926) at p. 515.
[7] *Op. cit.* at pp. 447—450.
[8] (1848) 12 Q. B.; 12 A. & E. (N.S.) 439. For an extreme case see *Miles* v. *Forest Rock* (1918) 34 T. L. R. 500.
[9] (1876) 2 Ex. D. 248.
[10] (1888) 20 Q. B. D. 359.

precautions were taken. The plaintiff, who was aware of the danger, was injured by a falling rivet. The Court had no difficulty in holding that he had not assumed the risk.[11] Finally in *Smith* v. *Baker*[12] the House of Lords held that mere knowledge of risk due to a dangerous defect in the plant or the system of work does not necessarily involve consent to undertake the risk on the part of a servant. The question is not whether he knew of the danger, but whether he in fact agreed to run the risk, and the rule applies even if the defect existed at the time of employment. It is obvious that this exception to the doctrine of assumption of risk goes much farther than the other exceptions, for here the relation between the plaintiff and the defendant is a contractual one, and is, therefore, voluntary on both sides. It might be argued, as Lord Bramwell did in his dissenting judgment, that in such a case there is an actual agreement to undertake the risk and not merely one implied in law. It is interesting to note that in most of the American jurisdictions the Courts have refused to accept the doctrine of *Smith* v. *Baker*. As Professor Bohlen has said[13]:

> Thus it has been seen that while in England the pressure of the servant's necessities has finally come to be regarded as destructive of his free will when placed in a position where he must either encounter some probable though not imminently threatening danger, or else give up his employment, the American cases stoutly deny it any such effect. It may well be that the different economic conditions of the two countries may account for this.

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[11] This list might be largely extended. Thus in *Thomas* v. *Quartermaine* (1887) 18 Q. B. D. 685, 696 Bowen L.J. said: 'The maxim, be it observed, is not "*scienti* non fit iniuria," but "*volenti*." It is plain that mere knowledge may not be a conclusive defence. . . . The injured person may have had a statutory right to protection, as where an Act of Parliament requires machinery to be fenced. . . . Or again the plaintiff may have a common right or individual right at law to find these particular premises free from danger, as in the case of lands on which a market or fair has been held: *Winch* v. *Conservators of the Thames*, L. R. 9 C. P. 378; *Lax* v. *Corporation of Darlington*, 5 Ex. D. 28.' And see Lord Halsbury's remarks in *Smith* v. *Baker* [1891] A. C. 325, 336—7, which must raise in us a wistful regret for a bygone age: 'It appears to me that the proposition upon which the defendants must rely must be a far wider one than is involved in the maxim "Volenti non fit iniuria." I think they must go to the extent of saying that wherever a person knows there is a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited; but where it applies, it applies equally to a stranger as to anyone else; and if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets; for no one (at all events some years ago, before the admirable police regulations of later years) could have crossed London streets without knowing that there was a risk of being run over.'

[12] [1891] A. C. 346.

[13] *Op. cit.* at p. 499.

He points out that in England the loss to a workman of his job is a very real misfortune and therefore the fear of losing it is a very pressing species of compulsion, while in America, at the time when the leading cases were decided, if one job was dangerous another could probably be found. This illustrates the fact that whether an exception to the rule of voluntary assumption of risk should or should not be made cannot be answered on grounds of pure logic, but depends, in the last analysis, on whether the Courts consider it desirable from the social standpoint.

One such exception which the American Courts have recognized with a unanimity remarkable in a country of such diversified jurisdictions is in the rescue cases, an exception which Scrutton L.J. has repudiated for English law in the present case. The American rule is that the doctrine of assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty. The authority usually cited for this doctrine is the New York case of *Eckert* v. *Long Island R. R. Co.*,[14] but it is important to note that this is only the first of a great number of cases; in Corpus Iuris over forty-five cases from the Federal and State Courts are given in a footnote to the rule.[15] Apparently no contrary case has ever been decided, and no question as to the justice or wisdom of the rule has been raised. That under the circumstances of the rescue cases the rescuer cannot be said voluntarily to assume the risk has been accepted by the American Courts as self-evident. The only difficulty they have had is in determining what duty is owed by the defendant to the rescuer, for at first sight the defendant's act is only wrongful towards the person imperilled. This is not enough, for, as Bowen L.J. said in

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[14] (1871) 43 N. Y. 502.

[15] In Corpus Iuris, vol. 45, pp. 966—8, § 520 (5) the rule is stated as follows: *Danger incurred to save life or to prevent personal injury to others.* Conduct which might otherwise be considered negligent may not be so considered where a person is injured in attempting to save others from imminent danger of personal injury or death. . . . One is not guilty of contributory negligence in exposing himself to danger of injury in order to rescue another from imminent danger of personal injury or death, if, under the same or similar circumstances, an ordinarily prudent person might have so exposed himself, or, as often expressed, if the act of intervention was not performed under such circumstances as would make it rash or reckless in the judgment of ordinarily prudent persons.

*Thomas* v. *Quartermaine*,[16] 'to prove negligence it is not enough to show that the defendant has been negligent to others, the plaintiff must show that there has been a breach of duty towards himself.' The American Courts have, however, taken the view that the defendant's act is not only a wrong to the person imperilled, but also to the rescuer because the wrongdoer ought to have foreseen that his act would cause the rescuer to take the risk.[17] This has been admirably stated in *Wagner* v. *International Ry.*[18] by Cardozo J.:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer.

The right of the rescuer is, therefore, an independent right and is not derived from that of the rescued, as is shown by the fact that the contributory negligence of the rescued which may bar his own right does not bar that of the rescuer.[19] There is a duty of care to the rescuer because the wrongdoer ought reasonably to have had him in contemplation as being so affected by

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[16] (1887) 18 Q. B. D. 685, 698.

[17] Lord Atkin's statement in *Donoghue* v. *Stevenson* [1932] A. C. 562, 580 is apposite here: 'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.' It cannot be suggested that the courageous rescue of persons imperilled is less foreseeable in England than it is in America. Thus Sir Frederick Pollock (Law of Torts (13th ed.) p. 498), in approving the doctrine of the *Eckert Case*, says: 'The law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue.'

[18] 232 N. Y. 176; 133 N. E. 437. In this case the plaintiff and his cousin, who were passengers on the defendants' electric railway, were standing on the platform of a car which gave a violent jerk when crossing a bridge. As the doors of the platform had negligently been left open, the cousin was thrown out and disappeared into the night. The car was stopped after crossing the bridge, and the plaintiff walked back along the trestle looking for his cousin's body. He missed his footing in the dark, fell from the bridge, and was injured. The Court of Appeals reversed the judgment of the lower Court directing judgment in favour of the defendants.

[19] *Highland* v. *Wilsonian Inv. Co.* (1933) 17 P. (2nd) 631. 'It may have been negligence for Mrs. Damon (the rescued), after having reached a place of safety, to return to the place of danger, but her negligence cannot be imputed to Mrs. Highland (the rescuer).' In this case the plaintiff went into a room filled with ammonia fumes, owing to the defendant's negligence, to rescue a friend. The judgment contains an interesting analysis of proximate cause and contributory negligence.

his act. The Courts of America are unanimous in their agreement that such altruistic and courageous acts of rescue are not only foreseeable but probable; it will be surprising if, when this question arises directly in a case, the English Courts take a different view.

The American Courts have even extended the doctrine of the rescue cases to cover instances where the plaintiff has voluntarily exposed himself to a risk in attempting to save either his own or a third person's property endangered by the defendant's wrongful act. Here there is less uniformity in the decisions, but the majority of the Courts, and these the most important, accept this view as correct. *Liming* v. *Illinois Central Ry.*[20] may be said to be the leading authority on this point, and it has been followed in a large number of similar cases. The defendant railway company negligently set fire to some grass. The plaintiff voluntarily went to a barn to save the horses belonging to a neighbour, was caught by the fire which had spread with great rapidity, and was badly burned. The Court said:

> He (the plaintiff) was under no legal obligation to protect the property of his neighbor; yet his attempt to do so was entirely lawful, and was most praiseworthy. If he had failed to make a reasonable effort to save it, he would have merited the censure and contempt of his neighbors. . . . Under the circumstances of the case, it was the natural and probable result of the wrong of the defendant.

The Court emphasized the fact that it is not a universal rule that a defendant is excused from liability merely because the plaintiff, knowing of the danger caused by the defendant's negligence, voluntarily incurs that danger. If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger, then the defendant is liable. The only difference between the life and the property cases is that a rescuer would not be justified in exposing himself to as great danger in saving property as he would in saving human life. Thus Andrews J., speaking for the strong New York Court of Appeals in *Wardrop* v. *Santi Moving and Express Co.*, said[21]: 'Undoubtedly more risks may be taken to protect life than to protect property without involving the imputation of negligence, but the rule is that a reasonable effort may be made even in the latter case.' Thus both in the life and property rescue cases the American Courts reject the doctrine that know-

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[20] (1890) 81 Iowa 246; 47 N. W. 66.
[21] (1922) 233 N. Y. 227

ledge of the danger to be incurred constitutes voluntary assumption of risk.

This does not, however, conclude the questions to be determined in these rescue cases, for, although there is no assumption of risk on the part of the plaintiff, nevertheless he may be guilty of contributory negligence. It is true that both the doctrine of voluntary assumption of risk and of contributory negligence are derivatives of the individualistic tendency of the common law [22] and are expressions of the same fundamental idea, but they are not identical. The distinction between the two was emphasized by Bowen L.J. in *Thomas* v. *Quartermaine* when he said [23]: 'But the doctrine of *volenti non fit iniuria* stands outside the defence of contributory negligence and is in no way limited by it. . . . Carelessness is not the same thing as intelligent choice, and the Latin maxim often applies where there has been no carelessness at all.' As a rule, in tort cases it is unnecessary to differentiate between the two, with the result that language on this subject has become rather lax, but in the rescue cases the distinction is important. It is incumbent on the plaintiff to show that it was reasonable for him under the circumstances to take the risk, and this is a question of fact to be determined in each case. How this works in practice may be illustrated by the three following American cases, all dealing with runaway horses. In *Manthey* v. *Rauenbuehler* [24] a driverless horse and cart galloped down a street in which there was a large number of children. The plaintiff's intestate dashed into the street from the pavement, seized the horse, and was killed while stopping it. The Court said:

> We do not think that such an act can be characterized as contributory negligence as matter of law. Such question is necessarily dependent upon the circumstances and conditions as they existed at the time when the act was performed.

In *Hollaran* v. *City of New York* [25] a pair of horses drawing a street sweeper were dashing ungoverned through the street when the plaintiff's intestate attempted to stop them and was killed. The Court said:

> The question, then, is whether a man strong in courage and capable physically should be content to let the probably destructive agency go its way or attempt to stop it. . . . Such sense of duty is based upon feelings of the highest value. Whether it was or was not culpable to obey the

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[22] Bohlen, *op. cit.* at p. 441.
[23] (1887) 18 Q. B. D. 685, 697.
[24] 75 N. Y. S. 714.
[25] (1915) 153 N. Y. S. 447.

> prompting to that duty depends upon the conditions presented.

That all attempts at rescue may not be reasonable is illustrated by *Devine* v. *Pfaelzer*.[26] In this case a driverless horse was bolting down an empty street. Plaintiff's intestate ran into the street, grabbed at the horse, was knocked down and killed. The Court said:

> The burden was on the plaintiff to prove that Fitzpatrick exposed himself to the danger for the purpose of saving the life or lives of some person or some number of persons then exposed to danger by the horse running away, and there was no evidence whatever tending in any degree to prove that fact. . . . As there was no evidence tending in any degree to prove that anyone was in danger, or that Fitzpatrick, in voluntarily incurring the risk, did so to save human life, he was not relieved from the charge of negligence, and the trial Court erred in not directing a verdict for the defendant.

The plaintiff cannot recover, therefore, under the American rule where no one is in imminent danger and the circumstances afford no reasonable basis for believing otherwise. It follows that even if the English Courts were to adopt the American rule, a plaintiff who acted as Cutler did in the instant case could not recover. There is nothing in the report to suggest that anyone was in imminent danger when Cutler, who testified that he had no great knowledge of horses, attempted to hold the horse. The plaintiff was a volunteer, not a rescuer. It is, therefore, submitted with respect that the learned Lord Justice's remarks concerning a man who attempts to stop a runaway horse are *obiter* and are not binding if the question should arise in a future case.

So far we have been discussing the doctrine of *volenti non fit iniuria* with its misleading air of simplicity,—misleading because in every case the real question is whether or not one of the many exceptions to the rule applies. We must now consider the second reason for the judgments in the Court of Appeal. Slesser L.J.[27] says that the negligence of the defendants was only the *causa sine qua non* while the essential cause of the accident—the *causa causans*—was the act of the plaintiff. Later he speaks of a *novus actus interveniens*. Similarly Scrutton L.J. says[28]: 'If, therefore that which happens is the result of a new cause intervening, as where a person intervenes in a matter in which he has no duty to act, it cannot be said

[26] (1917) 277 Ill. 255; 115 N. E. 126.
[27] At pp. 305, 306.
[28] At p. 305.

that in law the negligence is the cause of the accident.' With all respect, these phrases tend to obscure the problem before the Court. To call a cause a *novus actus interveniens* is not to give a reason for the Court's decision, but to state a result that has been arrived at on other, perhaps intuitive, grounds. Thus Slesser L.J. says [29]:

> There may be cases where, for example, a man sees his child in great peril in the street and, moved by paternal affection, dashes out and holds a runaway horse's head in order to save his child, and is injured; there there is no *novus actus interveniens.*

To say that the act of the father is not a *novus actus interveniens* while that of a stranger is, does not help us to understand why there is a distinction between the two cases,—it is merely a method of stating that the Court thinks that the father is entitled to a remedy while the stranger is not. In American Courts, where Latinity is less in favour, the popular phrase is proximate cause. This has been analysed by Bohlen as follows [30]:

> Legal proximity of causation may be defined as that conception of cause and effect which has been adopted by the Courts as the test by which to ascertain whether a particular harm is to be ascribed to a particular act or omission as its consequence as a prerequisite to the imposition of legal responsibility therefor.

Put in simple language, a proximate cause is a cause which the Courts have said is proximate. These decorative phrases are harmless so long as we realize that they have no definite meaning, but they are dangerous when we accept them at their face value and therefore fail to seek the true reason for a rule. Thus if we accept the statement that a rescuer cannot recover for his injuries because his own act constitutes a *novus actus interveniens* we have missed the whole problem in the case. When the American Courts say that the act of a rescuer is not a new cause intervening while Scrutton L.J. says that it is, each is merely stating a conclusion reached on other grounds.

It is therefore suggested that neither the maxim *volenti non fit iniuria* nor the vague phrase *novus actus interveniens* ought to prevent a rescuer from recovering damages from the wrongdoer. Does this mean that in the *Cutler Case* the plaintiff ought to have succeeded? By no means, for, as we have suggested above, this is not a rescue case. No one was in imminent

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[29] At p. 306.
[30] *Op. cit.* at p. 502.

danger, and the horse had come to rest in a field. The plaintiff was a volunteer, acting at the request of the defendants' servant, when he took hold of the reins. He was, therefore, in the same position as a groom who accepts a position to look after a dangerous horse. Here there is a true assumption of risk, and the plaintiff cannot recover for any injuries he suffers in consequence of his voluntary and reckless action.

It is particularly important to stress the point that the actual facts of this case, and those of the moot rescue case suggested by Scrutton L.J., are not identical, and that it is fallacious to argue from one to the other, because, strange to say, there is so little authority in English law on this point. This may be due to the erroneous belief generally held by the Bar that a rescuer cannot recover, for it is difficult to explain on any other ground why there should be so many cases on this point in America and only one in England. The sole English authority is *Brandon* v. *Osborne Garrett & Co.*[31] Here, while the plaintiffs, a husband and wife, were in a shop, the glass roof fell on the husband; the wife tried to pull him away and was injured. Swift J. held that—

> If she did something which a reasonable person in the circumstance ought not to have done she would not be entitled to damages, but if what she did was done instinctively and was in the circumstances a natural and proper thing to do, I think she is entitled to recover.

It is obvious that this case does not go as far as the American doctrine, for (1) the plaintiff was a wife and therefore owed a special duty to her husband, and (2) she acted instinctively. Thus in Salmond on Torts (7th ed.) [32] we find this case explained on the principle that 'he (the plaintiff) must not have time to think. If his action was deliberate, even though rapid, it will be a *novus actus interveniens*. . . .' It is a strange doctrine which will permit an instinctive rescuer to recover, but which excludes a deliberate, and therefore more courageous one.

Nor are the two Scots cases more satisfactory. In *Woods* v. *Caledonian Ry.*[33] a young woman, who was killed while attempting to drag her companion out of the path of a train, was held not guilty of contributory negligence, but it is difficult to determine on what facts the case was decided. *Wilkinson* v. *Kinneil Cannel and Coking Coal Co., Ltd.*,[34] the leading case on the point, is even more unsatisfactory. While the plaintiff

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[31] [1924] 1 K. B. 548.
[32] At p. 38.
[33] (1886) 13 R. 1118; 23 S. L. R. 798.
[34] (1897) 24 R. 1001; 34 S. L. R. 533.

and a fellow workman were employed in cleaning coal in a waggon, the plaintiff saw another waggon coming along the rails at great speed. He jumped off, and, seizing a wooden prop, tried to stop the waggon and was injured. In his averment he stated that he did this in a moment of hurry and confusion and owing to the extreme danger to himself and the other workman. In the Court of Session, the minority (the Lord Justice-Clerk, Lord Adam, and Lord Trayner) held that after having taken himself out of danger, he voluntarily attempted to rescue his companion, and that the principle of *volenti non fit iniuria* applied. The majority of the Court fortunately were able to judge his act in a less favourable light, and therefore held that he was entitled to an issue. Thus Lord Moncreiff pointed out that as the plaintiff himself was placed in a position of danger his actions 'are not to be judged by the same standard as those of one who has time to act calmly.' Lord Kinnear was doubtful, but thought that the plaintiff might be said to have been in danger himself. Lord M'Laren made the important point that he had a duty to take care of his employer's waggon and if he was trying to protect this it did not matter that he was also attempting to rescue his companion. Only Lord Young held that

> 'it cannot be pleaded against him that he voluntarily exposed himself to danger in turning back on the spur of the moment to save his companion, and that instead of doing so he ought to have allowed his companion to take his chance of being killed.'

Thus the majority of the Court was only able to decide in the plaintiff's favour by denigrating the courageous quality of his act; to such straits does a narrow interpretation of the maxim *volenti non fit iniuria* bring the judges.[35]

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[35] Attention should be called to Professor C. K. Allen's interesting discussion of this question in his book, Legal Duties, at pp. 217—220. He cites *Scaramanga* v. *Stamp* (1880) 5 C. P. D. 295, 304 which laid down that deviation in the course of a voyage in order to save life is an excuse for apparent breach of the terms of a charterparty, and quotes Cockburn C.J.'s words: 'The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity. . . . It is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential consideration as to injurious consequences.'

As so many American cases have been cited in this article, the following quotation from Cockburn C.J. in the same case at p. 303 may be of interest: 'I am glad to think that in doing so we have the advantage of the assistance afforded to us by the decisions of the American Courts and the opinions of American jurists, whom accident has caused to anticipate us on this question. And, although the decisions of the American Courts are of course not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence on our part.'

# THE DOCTRINE OF UNJUSTIFIED ENRICHMENT.[1]

H. C. Gutteridge and R. J. A. David.

## I. Introduction.

THE origin and growth in continental law of the doctrine of unjustified enrichment is not merely an object lesson of the greatest importance to comparative lawyers. It is also of peculiar interest to English lawyers because it affords an admirable illustration of the working of the system of precedent in the continental countries. Moreover, it furnishes abundant proof—if any be needed—of the fact that an elaborate system of rules based on judicial precedent can, and does, exist side by side with the provisions of codes which in their inception were designed to prevent case law from coming into existence.[2]

We have thought it wise to confine the discussion of the doctrine to the form which it has taken in French law. Our motive in so doing is not merely a desire to reduce this paper to readable dimensions; we believe that the adoption of this course will enable the attitude of English law towards this question to be shown in much clearer relief than would be possible if the background selected is a mosaic of the rules of many different countries. It is not our intention to intervene in the recent controversy on the question of the nature of quasi-contractual liability in English law,[3] but we venture to hope that this paper may perhaps be of some slight assistance in this connexion in so far as it defines the content of the doctrine of unjustified enrichment as we find it in a modern system of law, and illustrates the manner in which the doctrine functions when it is applied to the circumstances of everyday life.[4]

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[1] The term used in French law is 'enrichissement sans cause,' but legal opinion in France seems to prefer 'enrichissement illégitime'; the English term 'unjustified enrichment' which is used in this article is perhaps the nearest equivalent to 'enrichissement illégitime.'

[2] *E.g.* Code Civil français, Art. 5.

[3] Winfield, The Province of the Law of Tort, pp. 127 *et seq.*; Landon in the Bell Yard, No. VIII (November, 1931), p. 19; Winfield, *ibid.* No. IX (May, 1932), p. 32; Stallybrass, *Landon* v. *Winfield*: An Intervention, *ibid.* No. X (November, 1932), p. 18.

[4] We trust that it will not be thought that we have ignored the law of Scotland, and in particular the decision of the House of Lords in *Cantiare San Rocco* v. *Clyde Shipbuilding and Engineering Co.* [1924] A. C. 226, but in our view the background furnished by French law is preferable for comparative purposes as it covers a wider area than that of the corresponding rules in Scots law.

## II. Unjustified Enrichment in French Law.[5]

R. J. A. David.

The law is not called upon to intervene merely because the assets of one person may happen to be increased as the result of a corresponding diminution in the assets of another person. But it is always possible, in particular circumstances, that the enrichment of one person owing to the impoverishment of another is manifestly unjust, and this would seem to give rise to an obligation to make restitution which is based on principles of natural justice. The Civil Law has a moral basis and is consequently called upon to provide the necessary means to enable justice to be done in such cases.

A remedy was provided, though only in certain cases, by Roman Law in the form of the *condictiones* and of the *actio negotiorum gestorum*. Moreover, Julianus[6] asserted the existence of an action in the case where a person acting for his own benefit had in fact suffered a loss and at the same time conferred a benefit on another person. According to Paulus[7] the owner of land must indemnify a *bona fide* possessor who has increased the value of the land by work or expenditure of money. Pomponius[8] was the author of the famous dictum: '*iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem.*'

Speaking generally, the same principles held good in the French law of the eighteenth century. Certain general theories prevailed, such as that of the *condictio indebiti* (which Pothier calls *promutuum*) and of the 'gestion d'affaire' (*negotiorum gestio*); and, even where there were technical objections to the application of these theories, Pothier had little difficulty in ruling that the principles of *Equité*[9] must prevail over the niceties of the law (*la subtilité du droit*). He said: 'In our

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[5] *Literature* (in addition to text-books on French civil law or on the law of obligations): Rouast, *L'enrichissement sans cause et la jurisprudence civile* (Revue trimestrielle de droit civil, 1922-35); Maury, *Essai sur le rôle de la notion d'équivalence en droit civil français*, vol. ii (Thèse Toulouse, 1920); Ripert, *La règle morale dans les obligations civiles* (2nd ed. Paris, 1927).

*Abbreviations*: D. P. (Recueil périodique et critique Dalloz); D. Hebd. (Recueil hebdomadaire de jurisprudence Dalloz); S. (Recueil général des lois et des arrêts Sirey); Civ. (Civil Chamber of the Court of Cassation); Req. (Requêtes Chamber of the Court of Cassation); name of town (Court of Appeal sitting in that town); R. G. Z. (Entscheidungen des Reichsgerichts in Zivilsachen).

[6] D. iii, 5, De negotiis gestis, 6, 5.

[7] D. v, 3, De hereditatis petitione, 38.

[8] D. l, 17, De diversis regulis iuris antiqui, 206.

[9] *Equité* is a term of French law which cannot be translated into English, though 'natural justice' is an expression which comes very near it. It must not be confused with the English term 'Equity.'

French Courts we are not bound by forms of writs, so that natural justice is a sufficient foundation for a civil obligation and a cause of action.'[10] The draftsmen of the Code Napoleon proposed in this instance, as in many others, to remain faithful to tradition. Many of the Articles of the Code take the form of provisions which are obviously based on the principle of *Equité*, that one person shall not without justification enrich himself at the expense of another. Thus where money is paid without the payment being due, the money can be recovered back (Art. 1376). A *negotiorum gestor* is entitled to the reimbursement of money which he has properly expended in the interests of the person benefited by his action and also to an indemnity against any liabilities which he has properly incurred (Art. 1375). A person devoid of capacity may avoid a contract into which he has entered, but he must restore any benefit which he has received under the contract[11] (Arts. 1241, 1926). The owner must compensate a person who is in *bona fide* possession of real property for any expense necessarily incurred in connexion with the preservation of the property or for any improvements which have increased its value[12] (Arts. 555, 861, 862).

All these Articles relate, however, to special cases. There is no general provision in the Code to the effect that a profit must be restored if it has been received without justification at the expense of another. This gave rise to the question whether it was still possible to rely on the principle laid down by Pothier and in the absence of any specific provision of the Code to resort to *Equité* as the foundation of an action on the part of a person who has suffered an unjust detriment whereby some other person has profited.

The problem is one of practical importance because there are many cases of unjustified enrichment which are not dealt with by the special Articles of the Code Civil. An illustration will

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[10] Pothier, Oeuvres (ed. Bugnet), vol. 5, Du quasi-contrat negotiorum gestorum, No. 182 (see also eod. tit. Nos. 189, 192); and Traité du quasi-contrat appelé promutuum, Nos. 134, 140, 179.

[11] Where a minor has borrowed money without his guardian's authorization, he will be ordered to refund it, if there is evidence that the sum was used to satisfy a creditor who was entitled to sue the minor: Civ. February 23, 1891 (D. P. 1892, 1, 29). See also, in the case of a married woman: Req. April 26, 1900 (D. P. 1900, 1, 455); Req. January 2, 1901 (D. P. 1901, 1, 16). Colin et Capitant, vol. i, p. 562.

[12] For instance, where a person who is in possession of a house by virtue of a contract of sale which is avoided: Req. December 22, 1873 (D. P. 1874, 1, 241); Besançon, March 17, 1897 (D. P. 1898, 2, 211); or where a person possesses land, bequeathed to him by will, and a new will is discovered, the effect of which is to nullify the first one; or where a person has been given a chattel, and this donation becomes void by a child afterwards being born to the donor.

be found in the two following cases. A female shop assistant agreed to serve without a salary in consideration of a promise on the part of her employer that he would marry her. The marriage did not take place, and the woman claimed remuneration for the services which she had rendered gratuitously.[13] There is no Article of the Code Civil which covers this case. A firm of musical publishers continued to deal in Donizetti's works after the expiration of their contract with him. When Donizetti's heirs became aware of the facts they brought an action to recover the amount of the profits that had been improperly made by the publishers,[14] but there is no Article of the Code Civil which provides for a case of this description. Is it possible to found an action in these events on the principle of natural justice?

A lawyer who glanced superficially at the French law reports for the eighty years following the promulgation of the Code Civil would answer this question in the negative. No decision during this period lays it down, as Pothier did, that *Equité* will support an action in such cases. There is no decision which is based on the rule that no one shall without justification take an advantage to the detriment of some other person.[15]

But did French law at that time refuse to recognize the rule? It is hardly possible to draw any such inference, for the reported cases contain no decision which negatives the possibility of the existence of the rule,[16] or, at all events, a decision of this kind is only met with when it is imposed on the Court by a special Article of the Code.[17] The only observation that can be made is that until 1892 the decisions which order the restoration of an unjust benefit are always supposititiously based on an Article of the Code.[18] This manner of dealing with such questions was

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[13] Dijon, February 7, 1928 (D. P. 1928, 2, 169, note Voirin).

[14] Civ. July 6, 1927 (S. 1928, 1, 19).

[15] The principle is sometimes mentioned in the decisions of the Courts of this time (see Grenoble, August 12, 1836; S. 1837, 2, 330), but only as a moral precept, or in order to fix the basis on which a special provision of the Code relies; it is never invoked as being an independent and compulsory principle of the law.

[16] There is perhaps an exception in the case of Req. July 11, 1889 (S. 1890, 1, 97, note Labbé); the fact that the plaintiff had proved very negligent will, however, probably explain why he was not given any remedy.

[17] This reservation must be made on account of Art. 599, sect. 2, Code Civil, which provides that a usufructuary cannot, at the end of the usufruct, claim an indemnity by reason of the improvements he purports to have made, even if such improvements have increased the value of the thing. See for the unjust consequences of this article, Req. November 4, 1885 (S. 1886, 1, 113; D. P. 1886, 1, 361). A contract made between competent parties cannot be avoided, as a rule, on account of the unreasonable benefit (lésion) which it confers on one of the parties (Art. 1118).

[18] This ceases to be completely true after 1850, as appears from a decision of the Court of Paris, April 26, 1852 (D. P. 1853, 2, 181): a woman, through her

called for by the predominance of the exegetical method of judicial interpretation. It was, however, only necessary to refer to some Article of the Code; it was not necessary to apply it in its strict meaning. Many Articles of the Code could be applied so as to accord with the principles of *Equité*. Faced with the classical notion of *negotiorum gestio* in which the intention to act in the interests of some other person was required (*animus aliena negotia gerendi*) both legal literature [19] (*doctrine*) and the judges (*jurisprudence*) admitted the possibility of a *gestion d'affaire anormale* which was also based on Art. 1376 of the Code Civil and created the same liabilities but did not require that intention.[20] Numerous cases of unjustified enrichment were dealt with in this way: in others a key to the problem was provided by a subterfuge of a different kind. The party who had suffered the detriment was by a fiction deemed to have acted as the servant or agent of the other party,[21] or a contract of indemnity (*caution solidaire*) was presumed.[22]

Such devices are still frequently resorted to nowadays and many decisions are still supported by this abnormal use of the notion of *negotiorum gestio* or by the presumption of entirely fictitious contracts. But a great change took place in 1892 owing to the influence of the text-book writers and principally of Aubry et Rau and Labbé.[23] Since that date,[24] in fact, the French Courts have steadily declared that one may not without justification derive an enrichment from the detriment of another. The Court of Cassation, which deals only with points of law, will always reverse a decision which violates the principle of

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ignorance of the law, had not recognized the illegitimate child with whom she had always lived; she had consequently no right of any sort in his succession; the Court, however, gave her an indemnity against the assets of this succession for the expenses she had incurred in the upbringing of her child. See also Req. August 8, 1871 (D. P. 1871, 1, 240). Neither decision invokes any article of the Code, nor does either assert the principle that one may not, without justification, take advantage of another's detriment.

[19] Demolombe, vol. xxxi, No. 49; Laurent, vol. xx, No. 337.

[20] A child was sent by his parents, for his education, to a clergyman. The parents became insolvent. Held, that the clergyman could resort to Art. 1376 and sue the child himself for the whole amount of the expenses incurred in his education: Pau, January 19, 1852 (D. P. 1852, 2, 198).

[21] A son, who has come of age, goes on working for his father and living with him. Held, that there is an implied contract of employment, and that the son can sue his father for a reasonable salary: Dijon, March 26, 1874 (D. P. 1876, 2, 203).

[22] A man lives with his sister. Held, that he impliedly guarantees the payment of any debt contracted by her in their common interest: Req. February 4, 1901 (S. 1902, 1, 229).

[23] Aubry et Rau, vol. ix, § 578. Labbé, notes in S. 1890, 1, 97 and 1893, 1, 281. Criticism of the former decisions was principally inspired by technical reasons, and the desire to give back to the *gestion d'affaire* its proper character.

[24] Req. June 15, 1892 (S. 1893, 1, 281, note Labbé; D. P. 1892, 1, 596).

unjust enrichment.[25] This rule, which is given effect to by an action known as '*de in rem verso*,'[26] is as much a part of modern French law as any of the Articles of the Code Civil.[27] Its application is never challenged,[28] and if there were to be a revision of the Code Civil it would beyond doubt figure among any additions which would be made to the existing Articles.[29]

In some other countries the more recent Codes usually contain an Article framed in general terms which provides that an unjust benefit must be restored if it has been acquired at the cost of another person.[30] Thus it is provided by the German Civil Code (Art. 812) that anyone who receives a benefit at the expense of another without a sufficient legal ground must restore such benefit to the person at whose expense it was received. Even where the benefit was originally received on a sufficient legal ground, which has subsequently ceased to operate, or flows from some act in the law which has failed to attain its object the benefit must be restored.[31] The Swiss Federal Code of Obligations (Art. 62) provides in terms that anyone who is unjustly enriched at the expense of another must restore the benefit so received.[32] Both these enactments follow the lines laid down in the decisions of the French Courts.

It is the object of this brief survey of the subject to consider the juridical basis of the principle of unjustified enrichment as

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[25] Req. December 11, 1928 (D. Hebd. 1929, 18). As a matter of fact plaintiffs still resort, in the majority of cases, both to the principles of the *gestion d'affaire* (Art. 1376) and to the rule concerning unjust benefit. The reason is that they can get more by the operation of the former than by the effect of the latter.

[26] This name for the action is unanimously criticized by French lawyers, but unanimously adopted by them. The action has nothing in common but the name with the *actio de in rem verso* of the Roman civil law.

[27] In theory it still remains open to the Courts to challenge it, as it is only case-made law, and no precedent whatever is binding in France for a judge. But no defendant raises the point or questions the existence of the rule nowadays.

[28] An identical rule has been laid down in Belgium, in Luxemburg, and before 1900 in the parts of Germany where the French Code Civil was in force (Oberlandesgericht Darmstadt, April 20, 1895; D. P. 1897, 2, 332). The principle of unjustified enrichment is, on the contrary, still a matter of controversy in Italy, where the provisions of the law are nearly the same as in France : see de Ruggiero (*Istituzioni di diritto civile*, 5th ed. vol. ii, p. 483 ss.); Scuto (*L'ingiustificato arrichimento*, in Annali dell' Università di Perugia, viii, p. 260 ss.); Mastroini (*L'ingiustificato arrichimento*, in Rivista del Diritto Commerciale, 1926, 1, 632).

[29] See Art. 73 of the draft Franco-Italian revised Code of Obligations : 'Whosoever acquires a profit, without justification, at the expense of some other person, is bound to compensate him, in proportion to the damage which he has sustained.'

[30] See Code Civil of Japan (Art. 703), of Soviet Russia (Arts. 399 to 402), of Tunisia (Art. 71), of Morocco (Art. 66).

[31] Enneccerus, Kipp and Wolff, *Lehrbüch des bürgerlichen Rechts*, vol. ii, §§ 217 to 225. Gerota, *La théorie de l'enrichissement sans cause dans le Code civil allemand* (Thèse Paris, 1925).

[32] Von Tühr, *Allgemeiner Teil des Schweizerischen Obligationenrechts*, vol. ii, p. 369 ss. Bussy, *Etude sur les conditions générales de l'enrichissement illégitime en droit suisse* (Thèse Lausanne, 1922). Turkey has the same law of obligations as Switzerland.

it is found in French Civil Law [33] and as it is put into operation by means of the *actio de in rem verso*.[34]

*The juridical basis of the* actio de in rem verso.

It is always a matter of great practical importance in Continental Law to ascertain the juridical basis of a rule of law which has not been enacted by the Legislature. It is only thus that it is possible to discover the idea upon which the rule is founded and to ascertain what conditions must be annexed to its operation and what conclusions shall be drawn by the Courts when applying it in practice.

Several theories have been formulated for the purpose of explaining the reason of the rule that a man must restore a benefit which it would be unjust for him to retain. Planiol took the view that the *actio de in rem verso* has its origin in a quasi-delict.[35] Ripert and Teisseire based the action on the theory that whosoever creates a profit is entitled to benefit by it.[36] That the action is founded on a general principle of *équilibre des prestations* [37] is the view held by Maury [38] and also Rouast,[39] the latter of whom finds the basis of the principle in the law of nature.

All these views are, however, open to criticism. Planiol's theory would base the obligation to refund solely on the detriment caused to one of the parties, whilst the theory of Ripert and Teisseire rests on the fact of unjustified enrichment alone. The French Courts have declined to accept either of these consequences. As to the theory of Maury and Rouast, it is doubtful whether *équilibre des prestations* is required by French law; moreover, the introduction into the matter of

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[33] The doctrine of unjustified enrichment is also admitted in French 'administrative law,' *i.e.* in the relations between private persons and public bodies (*e.g.* State, provinces, parishes). See on this subject Mestre, *Gestion d'affaire et enrichissement sans cause en droit administratif* (Recueil de législation de Toulouse, 1913, p. 177); Roques, *De la notion d'enrichissement sans cause en droit administratif* (Thèse Montpellier, 1930).

[34] There is no unjustified enrichment, in the technical sense of this expression, and no *actio de in rem verso* is given, in France, where a special provision of the law (Arts. 1312, 1375, 1376, etc.) applies. In Germany and Switzerland, on the contrary, the doctrine of unjustified enrichment is of course regarded in a much wider sense, and contemplates all these particular cases.

[35] Planiol, *Classification des sources des obligations* (Revue critique de législation, 1904, 224).

[36] Ripert et Teisseire, *Essai d'une théorie de l'enrichissement sans cause* (Revue trimestrielle de droit civil, 1904, 727).

[37] *I.e.* what an English lawyer would call equality of consideration between the parties.

[38] Maury, *Essai sur le rôle de la notion d'équivalence en droit civil français* (Thèse Toulouse, 1920).

[39] Rouast, *L'enrichissement sans cause et la jurisprudence civile* (Revue trimestrielle de droit civil, 1922, 35).

the law of nature, the very existence of which is fruitful of controversy, cannot be regarded as furnishing a suitable foundation for a rule of positive law. In fact the only satisfactory ground upon which the principle of unjustified enrichment can be said to exist is that of the moral idea of natural justice.[40] This is so for two reasons. In the first place, natural justice must be regarded as a subsidiary source of French law. Secondly, the decisions of the Courts can be fully justified on this ground even when they appear to conflict with one another. It is a matter of the greatest difficulty to systematize all the decisions because the Courts have always had regard to the circumstances of each particular case when called on to say whether such circumstances give rise to a moral obligation to restore a profit which has been received.

*The conditions on which an* actio de in rem verso *will lie.*

It was in the year 1892 that the Court of Cassation first decided that natural justice is the foundation in French law of an action for the recovery of an unjustified enrichment. 'The action *de in rem verso* is based on the principle of natural justice which forbids a man to enrich himself at the cost of his neighbour. It is not regulated by any text of the French Codes, and, therefore, the circumstances in which it can be brought are not defined. 'The only requirement is that the plaintiff should allege and prove that he has conferred a benefit on the defendant by some sacrifice which he has made or by some act on his part.' In effect, this means that the question is left to the discretion of the judge.

This mode of formulating the principle has, however, become more elaborate since it was first introduced, as is indeed required by the spirit of French law. Two subsequent decisions of the Court of Cassation in 1914 and 1915 must be taken into account, and the rule is now stated in the following manner: 'The *actio de in rem verso* is founded on the principle of *Equité* which forbids an enrichment at the cost of one's neighbour. It applies in every case in which the patrimony of one person is without legitimate cause enriched at the expense of the patrimony of another, and the person suffering the detriment has no remedy based on contract or quasi-contract, or on delict or quasi-delict.'[41]

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[40] See Ripert, *La règle morale dans les obligations civiles* (Nos. 133 ss.).

[41] Civ. May 12, 1914 (S. 1918-19, 1, 41, note Naquet); Civ. March 2, 1915 (D. P. 1920, 1, 102). The new '*formule*' reproduces the actual words of Aubry et Rau (vol. ix, § 578).

An analysis of this rule reveals the existence of three conditions to which the institution of an *actio de in rem verso* is subject:—

(1) The defendant must have been enriched, and the plaintiff must have been impoverished.

(2) The enrichment of the defendant must be '*sine causa*,' *i.e.* it must not have arisen from any circumstances which the law will recognize as giving rise to a right to retain the benefit.

(3) There must be no other remedy available to the plaintiff.

It must be admitted that some difficulty is created by the fact that some of the decisions of the French Courts go beyond the limits imposed by these conditions; in fact, the very existence of the third condition must be regarded as doubtful.

### (A) *Enrichment and Impoverishment.*

It is necessary, first of all, that the defendant in the action should have been enriched and also that the plaintiff should have been impoverished, and that these two facts should result the one from the other, or should, at least, be indivisible in their common origin. But a further question arises as to the application of these conditions in practice.

It would appear that 'enrichment' and 'impoverishment' must be understood in a wide sense. Enrichment may either be an increase of the assets of the defendant or it may arise from the fact that property which would otherwise have been lost to him is preserved,[42] or that he is spared some expense which he would otherwise have incurred.[43] It has even been said that a benefit of a moral or non-material character will be sufficient if its pecuniary value can be estimated, but there are no decisions of the Courts which support this statement. An old decision of the Court of Pau to the effect that there was a *gestion d'affaire* where a teacher sued his pupil for expenses incurred in connexion

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[42] In order to put out a fire in a house, damage is done to a neighbour's house. The neighbour is entitled to resort to the *actio de in rem verso* : Tribunal de paix Vanves, July 26, 1927. (D. Hebd. 1927, 535).

[43] Certain goods, which her husband is under a duty to supply to her according to Art. 214 of the Code Civil, have been ordered by a married woman, and delivered to her; the seller of the goods may bring an *actio de in rem verso* against the husband : Paris, June 17, 1899 (D. P. 1900, 2, 105). The doctrine of unjustified enrichment is in such cases usually excluded in practice, as the Courts hold that the wife contracts as an implied agent of her husband, for all the necessary household expenses. See also Dijon, February 7, 1928 (mentioned above), where a woman had been working gratuitously in a shop and the owner of the shop had been saved the cost of the salary of a shop assistant.

with the instruction given [44] was rendered before 1892 and cannot be regarded as a precedent.

Where there is no evidence that the defendant has been enriched the *actio de in rem verso* will not lie, as, for instance, if there is no community of property between husband and wife and the wife carries on business; then the husband cannot be sued on the ground that he may have derived an indirect profit from delivery of the goods to the wife.[45]

Although the requirement that the defendant should have been enriched is well established it would seem that the question of what constitutes impoverishment has sometimes been neglected. It is indisputable that impoverishment takes place when something of value passes out of the patrimony of the plaintiff and also where something of value which would normally have passed into the patrimony of the plaintiff fails to do so.[46] There is also impoverishment if the plaintiff does not receive a profit which he had legitimate grounds to expect. This will be the case where a woman works gratuitously for a man who has promised to marry her,[47] or a genealogist carries out researches as the result of which a person, who is under no contractual liability to him, is able to obtain possession of an estate,[48] or where a broker brings two persons together and business results.[49]

The right to bring the *actio de in rem verso* has often been denied where there is no evidence that the plaintiff has suffered any impoverishment. Thus in a recent case a miller was obliged to pay certain taxes to the Government in order to procure a supply of water to a stream. The supply so obtained was also used without any payment of taxes by another miller whose premises were situated lower down the stream. It was held that the second miller was enriched, but that the first miller had not been impoverished and therefore could not sue the second miller.[50]

Nevertheless it is difficult to see how there was any

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[44] Pau, January 19, 1852 (D. P. 1852, 2, 198), mentioned above. The question seems never to have been decided in German law.

[45] Colmar, July 15, 1930 (Revue juridique d'Alsace et de Lorraine, 1931, 298).

[46] See the case, mentioned above, in Civ. July 6, 1927 (S. 1928, 1, 19) : copyright fees normally payable to the heirs of Donizetti.

[47] Dijon, February 7, 1928 (D. P. 1928, 2, 169, note Voirin).

[48] Poitiers, December 2, 1907 (D. P. 1908, 2, 332).

[49] Req. August 8, 1871 (D. P. 1871, 1, 240); Paris, December 1, 1910 (Gazette des Tribunaux, January 29, 1911); Tribunal de paix Troyes, April 10, 1929 (Journal des Juges de paix, 1929, 279). What constitutes the unjustified enrichment of the defendant in these cases does not appear very clearly.

[50] Req. June 22, 1927 (S. 1927, 1, 338). See also Civ. October 18, 1904 (S. 1907, 1, 465, note Wahl). Cp. Grenoble, August 12, 1836 (S. 1837, 2, 330).

impoverishment of the plaintiff in the following case in which the Court of Cassation allowed the action to be brought. A water company when distributing water to its customers made use of pipes belonging to a private owner. It was held that this was a case of unjustified enrichment and that the company must compensate the private owner.[51] The nature of the impoverishment suffered by the plaintiff was not specified by the Court, and there does not seem to have been anything more in this case than a trespass which caused no loss to the private owner.

In another case the existence of any actual damage to the plaintiff also appears to be somewhat doubtful. A landowner built a road on his land at considerable expense, and used it for the purpose of working a quarry on his land. An adjoining owner, in purported reliance on Art. 682 of the Code Civil,[52] claimed the right to use the road in order to work a rival quarry. The Court of Appeal of Grenoble applied the doctrine of unjustified enrichment to the case and ordered the adjoining owner to contribute one third of the cost of building the road.[53] That the decision is in accordance with the principles of *Equité* is undoubted, but it is not so clear that there was any impoverishment suffered by the plaintiff. The decision may rest, perhaps, on the fact that the working of the first quarry was rendered less profitable by the competition of the second one. But even if this was so, it can be challenged on the ground that the claim failed to comply with another requirement which now calls for consideration.

The third requirement is that a certain connexion must exist between the impoverishment suffered by the plaintiff and the enrichment accruing to the defendant. It must be clear that the defendant would not have been enriched unless the plaintiff had been impoverished. It is on this ground that the decision of the Court of Grenoble is open to criticism. There is some doubt whether it is necessary that the enrichment should be the direct consequence of the impoverishment.[54] The French Courts

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[51] Req. December 11, 1928 (D. Hebd. 1929, 18).

[52] Art. 682 provides that the owner of land, which forms an *enclave* and is not provided with a sufficient exit to the highway, may claim a right to pass through the land of his neighbour, provided he pays an indemnity corresponding to the damage he thereby inflicts.

[53] Grenoble, June 25, 1924 (D. P. 1926, 2, 41, note Rouast).

[54] *Contra* see Bartin, on Aubry et Rau (vol. ix, § 578, note 9 *decies*); Civ. July 31, 1895 (D. P. 1895, 1, 391). Sums were lent to allow the construction of a railway by an independent contractor. This contractor having become insolvent, the lender sued, by an *actio de in rem verso*, the town of Arles, which had derived a definite profit from the construction of the railway. The action failed, the Court refusing to take an indirect enrichment into account.

have, it is true, sometimes ordered the restitution of an enrichment of an indirect character.[55] But it is clear that there must in the first place be a chain of causation between impoverishment and enrichment, and, secondly, that the enrichment should be unjustified. In the great majority of cases these two conditions will operate to prevent the *actio de in rem verso* from being maintained where the enrichment is only indirect.

(B) *The Unjustified Character of the Enrichment.*

Restitution of an enrichment cannot be claimed unless it is of an unjustified character. It is frequently said that an action will lie only where the enrichment is *sine causa*, and it is this which has given its name to the doctrine of '*enrichissement sans cause*' as we find it in France and Belgium. But it would seem to be advisable in this connexion to refrain from the use of the term '*cause*,' which has a technical meaning in the Code Civil, at least in connexion with contracts. It is calculated to mislead if applied to the decisions of the Courts, and it is preferable, therefore, to speak only of unjustified or unlawful enrichment as is done in the Swiss Code (*enrichissement illégitime*).[56]

Whether an enrichment shall be regarded as unjustified or not is a matter which must be decided by the Court in its discretion on the facts of each individual case. It would seem, for instance, that a plaintiff ought not to succeed in an *actio de in rem verso* if the Court is satisfied that he would not have been impoverished except for gross negligence on his part.[57] But it is possible to specify certain principles which should guide the Court in coming to a conclusion on the question whether an enrichment is to be regarded as unjustified or not.

An enrichment can never be regarded as unjustified if the defendant is entitled by virtue of some provision of the law either to demand a benefit or to retain it. The doctrine of unjustified enrichment does not exist for the purpose of remedying hardships created by the operation of the textual provisions

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[55] *Sic* Rouast (*loc. cit.*); Req. June 15, 1892 (S. 1893, 1, 281, note Labbé; D. P. 1892, 1, 596); Req. December 20, 1910 (D. P. 1911, 1, 377, note Planiol); Douai, May 26, 1930 (Recueil des arrêts de la Cour d'appel de Douai, 1931, 168). The facts of these decisions are related hereafter. See also the decisions, already quoted, in the case of a broker, who has enabled a contract to come into existence.

[56] The traditional principle, quoted by Pothier, is: '*nul ne doit s'enrichir injustement* aux dépens d'autrui.'

[57] This rule, the existence of which is not absolutely clear, would explain the decision of Req. July 11, 1889 (S. 1890, 1, 97, note Labbé). See also note Wahl, on Civ. October 18, 1904 (S. 1907, 1, 465). An idea of the same kind explains the provisions of the German and Swiss laws which strictly limit the time within which the action can be brought.

of the Code Civil. The decision of the Court of Grenoble which has just been referred to [58] is open to criticism on the ground that the defendant in that case was empowered to act as he did by virtue of Art. 682 of the Code.

Nor can an enrichment be regarded as unjustified where it is derived from a contractual obligation imposed on the other party, however scandalous such enrichment may appear to be. This follows from Arts. 1134 and 1118 of the Code Civil, which provide that the parties make their own law by their agreement, and that except in certain special cases a disproportionate profit accruing to one of the parties is no ground for setting a contract aside. Therefore if a fire insurance policy gives the insurer the option either of paying the amount insured or of rebuilding the premises, and the insurer adopts the second course, he will not be allowed to contend that the assured has derived an unjustified benefit from the fact that he obtains a new house which is more valuable than the one which was burnt down.[59] In other words, a benefit derived from a contract can never be an unjustified enrichment giving rise to the *actio de in rem verso*.

But although this principle is incontrovertible, there is a difficult problem which arises in connexion with contracts. Can an enrichment be unjustified if it proceeds from a contract which has been entered into, not with the aggrieved party, but with someone else? Several decisions of the French Courts seem to answer this question in the affirmative.

In the forefront is the celebrated case of 1892 which first stated the general principle of unjustified enrichment. The facts in that case were as follow. A tradesman had sold and delivered manure to a farmer on credit and the farmer had dug it into the land. The farmer became insolvent and his tenancy of the farm was determined. The seller of the manure brought an *actio de in rem verso* against the landlord of the farmer and claimed the price of the manure on the ground that the value of the land had been increased. The landlord disputed the claim on the ground that the enrichment was not unjustified, because the farmer had contracted to maintain and to improve the quality of the land. The Court of Cassation nevertheless held that the seller was entitled to recover.[60]

Another case which was decided in the same way was the following. A woman who was the joint owner of a house with

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[58] Grenoble, June 25, 1924 (D. P. 1926, 2, 41, note Rouast).
[59] Req. July 21, 1903 (S. 1904, 1, 21; D. P. 1904, 1, 181).
[60] Req. June 15, 1892 (S. 1893, 1, 281, note Labbé; D. P. 1892, 1, 596).

her children entered on her own account into a contract for improvements to be made to the house. She was insolvent, and the person who had carried out the improvements sued the children on the ground that they had been unjustly enriched. The Court of Cassation held the children to be liable on the ground that the work which had been done brought a new value into their patrimony without a just cause, and they had therefore been unjustly enriched at the expense of the plaintiff.[61]

Then again, where goods were pledged to a creditor, a man who by arrangement with the debtor did work which improved the value of the goods was held to be entitled to sue the creditor on the ground of unjustified enrichment.[62] A broker who without any contract succeeds in bringing about business relations between two other persons is entitled to be recompensed for the work he has done, although the benefit to the other persons arises only from dealings between them.[63]

It would seem at first sight that a principle may be deduced from the above decisions, namely, that a contract existing between the party who has been enriched and a third party does not, according to Art. 1165 of the Code Civil (*infra*), constitute a justification of the enrichment. But French law does not recognize this principle, and the enrichment cannot as a general rule be recovered in such cases, so that the decisions referred to must be regarded as being of an exceptional nature and only to be supported by the special facts of each case.[64] At all events they must not be regarded as conclusive.[65]

On the other hand, there are a great many definite decisions to the effect that an enrichment can never be recovered by the *actio de in rem verso* if it proceeds from a contract, even though such contract was one entered into with a third party. A contractor who has carried out work for the tenant cannot sue the landlord in spite of the fact that the landlord has profited by

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[61] Req. December 20, 1910 (D. P. 1911, 1, 377, note Planiol).

[62] Lyons, January 11, 1906 (S. 1907, 1, 466; D. P. 1906, 2, 132).

[63] Req. August 8, 1871 (D. P. 1871, 1, 240); Paris, December 1, 1910 (Gazette des Tribunaux, January 29, 1911); Tribunal de paix Troyes, April 10, 1929 (Journal des Juges de paix, 1929, 279).

[64] In the case first cited the price of the manure had been placed to the credit of the landlord, in the final settlement between him and the farmer. In the second case it had been held by the Court of Appeal that the mother had acted in the interest of her children and with their assent, so that Art. 1376 had consequently to be applied. The decision of the Court of Cassation is very brief, and in spite of appearances may be founded on the principle of *gestion d'affaire*, especially as it considers the children as liable for the whole sum claimed by the contractor and not only for the increase of value given by the work to the house.

[65] The Court of Lyons, January 11, 1906, refers to the thesis here criticized only in the recitals of its judgment, but does not apply it in its decision. The decisions concerning the broker might have been better founded on a contract implied by conduct.

the work.[66] The landlord cannot be sued for the value of manure brought on to the land by his tenant: 'this is a benefit which proceeds from the existence of the lease and of the low rent which has been stipulated for.'[67] A labourer who has worked for a *métayer* who becomes insolvent cannot bring an *actio de in rem verso* against an owner of the land who has benefited by his work.[68] All these decisions illustrate a definite principle, *i.e.* that an enrichment is not unjustified when it proceeds from a contract between the defendant and another party. The mere fact that such contract is *res inter alios acta* (Art. 1165 of the Code Civil) is immaterial.[69]

The *actio de in rem verso* will lie, on the other hand, where no justification for the enrichment of the defendant can be found either in the law itself or in the terms of a contract. Thus in a recent case a usufructuary had done extensive repairs to a house which were necessary in order to preserve it. By French law neither the usufructuary nor the owner can be compelled to do repairs of this nature, but it was held, nevertheless, that the usufructuary was entitled to sue the owner by means of the *actio de in rem verso*.[70] It is significant that by Art. 599, *alinéa* 2 of the Code Civil a right of action for improvements made to property is expressly denied to an usufructuary, so that the fact that the Court in the above case refrained from applying this provision of the Code by analogy is good evidence of the extent to which the doctrine of unjustified enrichment has progressed since the enactment of the Code Civil.

### (C) *The Subsidiary Character of the Action.*

Finally, it is said that the *actio de in rem verso* will only lie where the law provides no other means of making good the detriment which has been suffered by the plaintiff. An illus-

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[66] Req. February 12, 1933 (D. P. 1933, 1, 64); Civ. December 14, 1931 (D. Hebd. 1932, 98); Lyons, November 5, 1930 (Moniteur judiciaire de Lyon, September 11, 1931). Adde Civ. March 2, 1915 (D. P. 1920, 1, 102); Req. November 22, 1908 (D. P. 1912, 1, 217, note Ripert).

[67] Douai, May 26, 1930 (Recueil des arrêts de la Cour de Douai, 1931, 168).

[68] Civ. October 18, 1898 (D. P. 1899, 1, 105).

[69] The opposite rule would, however, probably be adopted if the contract out of which the defendant derives his enrichment was a gratuitous contract (*e.g.* where goods which have not been paid for have been given to the defendant at a time when the donor was perfectly solvent, thus excluding the application of Art. 1167 of the Code Civil). No precedent seems to exist on this question, which is a matter of controversy in Swiss law. But though it would have a '*cause*' in the sense of Art. 1131 of the Code Civil, the enrichment would most probably be considered as unjustified and have to be restored.

[70] Paris, July 27, 1928 (S. 1930, 2, 73, note Chavegrin). Enrichment of the owner was held quite correctly by the Court not to arise either out of the cost of the works done or the increase of value given to the house, but only out of the increase of value given by the work to the right of ownership.

tration of that is to be found in a recent decision of the Court of Luxemburg. A tenant had paid certain taxes which were in fact due from his landlord, but he was not allowed to bring the *actio de in rem verso* against the landlord, as the proper course for him was to proceed against the Fiscus by means of the *condictio indebiti*.[71]

It is also said that this subsidiary character of the action not only prevents its employment where the person impoverished can obtain satisfaction in some other way, but also debars him from resorting to it where there are obstacles of a technical character which stand in the way of legal proceedings. There are several decisions which are invoked in aid of this assertion. In one case there was no written evidence of a loan as required by law, and it was held that the plaintiff could not rely on the principle that the defendant had been unjustly enriched by the receipt of the money.[72] A building contractor failed to comply with the requirements of the law which were necessary in order that he should be entitled to a prior lien or charge for the work which he had done, and it was held that he could not claim priority against other creditors in the bankruptcy of the building owner on the ground that he had increased the assets of the building owner and thereby unjustly enriched the creditors.[73] Persons who had preferential claims to certain of the assets of a corporation which was dissolved failed to make good their claims within the period prescribed by law. It was held that the doctrine of unjustified enrichment did not operate to enable them to sue the liquidator for the return of the assets or their value.[74] All these decisions are relied on as illustrations of the subsidiary character of the *actio de in rem verso*.

But it is also said that the subsidiary character of the action will not prevent the plaintiff from resorting to it if the obstacle to the employment of some other form of action which is available arises from the facts of the case and not from any rule of law. This in particular is the case where goods delivered to an insolvent person (quite apart from any question of mandate or *gestion d'affaire*) have in fact profited some person other than the insolvent, as, for instance, where food is purchased and delivered to the insolvent but is consumed by other persons who live with him. Here the seller is debarred by no rule of the *law* from bringing an action against the purchaser, and it is a

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71 Tribunal Luxemburg, February 6, 1931 (S. 1932, 4, 23).
72 Civ. May 12, 1914 (S. 1918-19, 1, 41, note Naquet).
73 Civ. February 11, 1923 (D. P. 1924, 1, 129, note Rouast).
74 Civ. July 18, 1910 (S. 1923, 1, 153).

mere *fact*, *i.e.* the insolvency of the purchaser, which renders this action useless.[75] In such a case it is said the *actio de in rem verso* may be brought provided that the plaintiff's negligence is in no way responsible for the situation.

These glosses on the main doctrine are, however, open to criticism, and it is even doubtful whether the *actio de in rem verso* can be regarded as being subsidiary in character.[76] Can it be said that the action is subsidiary because it is not derived from the provisions of the Code Civil but is based on natural justice? This view of the matter seems to rest on a confusion of ideas. It is true that natural justice or *Equité* is a subsidiary source of French law, but this only means that natural justice cannot override any rule of positive law and may only be called upon to fill a gap in the law. But it does not mean that a rule based on *Equité*, when it is admitted by French Courts, must be regarded as in any way inferior to, or of another nature than, a rule enacted in the Code. It would make no difference if the rule that no one may without justification retain a profit which has accrued to him at the expense of someone else had been enacted in the Code Civil instead of being based on natural justice. The doctrine that the *actio de in rem verso* is of a subsidiary character constitutes in effect an attempt to revive forms of actions which do not exist in modern French law. There are no grounds in support of this theory.[77]

The decisions which are relied on in support of the subsidiary character of the action are founded on different considerations; they proceed on the assumption that there has been a fraud on the law (*fraude à la loi*). It was impossible in any of these cases to allow the *actio de in rem verso* to proceed, because the underlying motive of the plaintiff was to utilize the action for the purpose of evading imperative provisions of positive law and to circumvent rules such as those relating to evidence and to prescription, or the rules which forbid the preference of a creditor. The doctrine of unjustified enrichment, as in the case of all other legal doctrines, must not be employed for the purpose of defeating the principles of positive law.[78]

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[75] See also the case of the seller of the manure, and the other cases mentioned in the same place.

[76] The origin of that principle is to be found in the formula of Aubry et Rau; but it seems to be doubtful whether these learned writers meant by their words everything which has subsequently been attributed to them.

[77] Colin et Capitant, vol. ii, p. 420 (5th ed.).

[78] See another illustration of this rule in Civ. July 3, 1928 (S. 1928, 1, 356): an *actio de in rem verso* cannot succeed, when it would indirectly enforce in France a fiscal law of a foreign country. Cp. for the German law, two decisions of the Reichsgericht, March 5 and July 9, 1932 (R. G. Z. 137, 206).

The only decision referred to above which rests solely on the theory of the subsidiary character of the *actio de in rem verso* is that of the Court of Luxemburg, but that decision is open to the objection that it gives rise to circuity of actions and it can be attacked on that ground. In a similar case the French Court of Cassation adopted the opposite view [79]: it permitted the heirs of Donizetti to proceed against the publishers by way of *actio de in rem verso* instead of suing the infringers who had given the performances for breach of copyright, and leaving them to obtain redress in turn from the publishers. That decision, together with those which allow the *actio de in rem verso* when the facts do not permit of other remedies, makes it clear that the action does not possess a subsidiary character. The truth of the matter is that an *actio de in rem verso* will not be commenced, as a rule, if some other remedy is open to the aggrieved person.

*The operation in practice of the* actio de in rem verso.

The consequences which should follow from the employment of the *actio de in rem verso* have been settled by the French Courts with due regard to the fact that the action is founded on the notion of natural justice. The scope of the action is solely to restore an equilibrium which has been disturbed unjustly, and it should not be allowed to operate so as to create any injustice of another kind.

The rules which govern the effect of an *actio de in rem verso* can be thus stated. The restitution ordered in the action must not exceed either the quantum of the enrichment of the defendant or that of the impoverishment of the plaintiff. Further, the extent both of enrichment and impoverishment must as a rule be ascertained as they exist at the time when the action is brought.

The first of these rules has met with general approval. It gives the *actio de in rem verso* its special character and distinguishes it from other remedies given by the law which are based on different principles. Where a wrong has been committed, French law will give the injured party the full amount of the loss which he has suffered; in the case of *gestion d'affaire* the person acting in the interests of another is fully indemnified. In neither of these two cases is the right to recover conditioned by the profit which has accrued to the defendant. It is therefore to the advantage of a plaintiff to set up the commission of a

[79] Civ. July 6, 1927 (S. 1928, 1, 19), mentioned above.

wrong or to rely on *gestion d'affaire*, and he will, as a general rule, only resort to the doctrine of unjustified enrichment when no other remedy is available to him.

The Courts have been consistent in declaring that the amount recoverable in an *actio de in rem verso* must not exceed the enrichment of the defendant or the impoverishment of the plaintiff, but they have not always applied this principle very strictly in practice. There are certain cases to which reference has already been made in which it does not appear very clearly that the plaintiff had suffered a detriment. In the case of the genealogist [80] the sum awarded as compensation by the Court is hardly distinguishable from a salary, though it is not referred to as such in the judgment. Where goods were sold and delivered to a woman but her brother also benefited by them, the Court of Cassation did not attempt to assess the extent to which he had been benefited but held him to be liable for the whole of the unjustified enrichment.[81] The Courts have in fact exercised their discretion and have endeavoured to apply the principle of unjustified enrichment in such a way as to do substantial justice.

The rule that the enrichment and the impoverishment must respectively be ascertained as at the time when the action is brought is found in all the text-books [82] and it has also been applied by the Court of Lyons.[83]

### *Conclusions.*

The doctrine of unjustified enrichment is one of the most interesting features of modern French law. It shows how, notwithstanding codification of the law, the judges, under the influence of text-book writers, have been able to create a general working principle which satisfies the requirements of natural justice.

The doctrine has always been applied in practice with due regard to the requirements of natural justice. It is consequently impossible to state the doctrine in a form which is

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[80] Poitiers, December 2, 1907 (D. P. 1908, 2, 232).

[81] Req. February 4, 1901 (S. 1902, 1, 229). It is true that the decision not only resorts to the doctrine of unjustified enrichment, but is also based on the presumption of an implied guarantee given by the defendant for the purchases of his sister.

[82] The same rule obtains in Germany (Enneccerus, vol. ii, § 224) and in Switzerland (von Tühr, vol. ii, § 53). Planiol-Ripert (vol. vii, p. 50) goes so far as to suggest that the assessment should be made in certain cases as at the date of judgment.

[83] Lyons, January 11, 1906 (S. 1907, 1, 466; D. P. 1906, 2, 132).

absolutely systematic, because it is dominated by the subjective and paramount notions of morality and fair play.

In conclusion it may be worth while to make the following observations. The doctrine shows the great advantages of a theory which is not hampered by '*subtilité de droit*,' as Pothier points out, and is always at hand to prevent injustice. At the same time it illustrates the dangers which might have arisen from conferring a power on the judges to act at their discretion in each individual case. But this danger has hitherto only existed in theory. French legal writers are unanimous in praising the caution and wisdom which has always been displayed in this instance by our judges.

## III. Does English Law Recognize a Doctrine of Unjustified Enrichment?

H. C. Gutteridge.

When we contemplate the havoc which has been wrought in the field of English law by the enunciation of maxims of a rhetorical character [84]—some of which are of uncertain origin and still more uncertain operation—it may, perhaps, seem strange that our law is so unreceptive when it comes to be a question of applying a broad general principle such as that of unjustified enrichment. The explanation seems to be that our law of quasi-contract, such as it is, has developed along a channel which was carved out for it by *indebitatus assumpsit*, and that this has proved to be too restricted to permit of the growth of remedies of a non-contractual nature, though it did not interfere with the destructive force of maxims of a negative character, as, for instance, when Lord Ellenborough applied the maxim of *ignorantia iuris haud excusat* in *Bilbie* v. *Lumley* [85] to the case of money paid under a mistake of law.

In the case of unjustified enrichment the traditional classification of forms of action forced all claims into the contractual class of obligations, and the result is that although English law sometimes allows a right of recovery to the impoverished party, it has steadily refused to recognize any general obligation to restore a profit which is in the nature of an unjustified enrich-

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[84] In *Yarmouth* v. *France* (1887) 19 Q. B. D. 647, 653 Lord Esher said: 'I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.'

[85] (1802) 2 East 469.

ment. It would seem, in fact, that the theory of unjustified enrichment received its death blow in *Sinclair* v. *Brougham*.[86] Lord Dunedin, a Scots lawyer, seems to have been prepared to admit the existence of a 'supereminent equity' in cases of unjust benefit,[87] but the views of the other Law Lords were crystallized by Lord Sumner when he said that money paid cannot be recovered back merely because 'it would be the right and fair thing that it should be refunded to the payer.'[88] Lord Mansfield's view that the action for money had and received is founded on principles of natural justice[89] cannot be sustained in spite of the fact that it has found some support in modern cases.[90] Professor Winfield, who has carried research into this question further than any other English writer, is, nevertheless, unwilling to concede that the doctrine of unjustified enrichment (or unjust benefit, as he quite rightly prefers to call it) has disappeared from our law, and he relies *inter alia* on the undoubted fact that salvage actions and actions to recover general average contributions are based historically on the principle of *aequum et bonum*.[91] But both these actions originated in maritime law and not in the ordinary municipal law of England.[92] In fact maritime salvage is not enforceable at Common Law and still retains its character of a purely maritime remedy.[93] The right to recover general average contributions is now a Common Law right, but it only became such by the abandonment, in a sense, of the theory that it rested on the principle of '*aequum et bonum*.' It was part of the booty which was appropriated by the Common Law Courts in the seventeenth century during the struggle between the King's judges and the Court of Admiralty, and in order to enable an action for contribution to be brought at Common Law it was necessary to found it on the theory of

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[86] [1914] A. C. 398. In fact the existence of any such doctrine would seem to have been negatived long before this date in *Marriot* v. *Hampton* (1797) 7 T. R. 269.

[87] [1914] A. C. at p. 434.

[88] *Ibid.* at p. 456. See also *Baylis* v. *Bishop of London* [1913] 1 Ch. at p. 140; *per* Scrutton L.J. in *Holt* v. *Markham* [1923] 1 K. B. at p. 513.

[89] *Moses* v. *Macferlan* (1760) 2 Burr. 1005; *Towers* v. *Barrett* (1786) 1 T. R. 133.

[90] See Winfield, The Province of the Law of Tort, p. 130, and the cases cited in note (4) on that page. Cf. Hanbury, 'The Recovery of Money,' 40 L. Q. R. 31—42.

[91] Winfield, *op. cit.* p. 139.

[92] Holdsworth, History of English Law, vol. i, p. 559; *ibid.*, vol. viii, pp. 265 and 269; *Falcke* v. *Scottish Imperial Insurance Co.* (1887) 34 Ch. D. at p. 249; *The Gaetano and Maria* (1882) 7 P. D. at p. 143. It is interesting to observe that French law also deals with '*sauvetage*' and '*assistance*' on a special footing. See Walton, The Egyptian Law of Obligations, p. 165.

[93] It is protected by a maritime lien and is enforceable by suit in a Court of Admiralty. Maclachlan, Law of Merchant Shipping (6th ed.) p. 529.

an implied contract to contribute,[94] which has now supplanted the old Admiralty theory of *aequum et bonum*.[95] With all deference to the learned author of the Province of the Law of Tort, it does not seem that these two actions lend support to the view that English law recognizes the existence of actions for the recovery of money which are based on principles of natural justice or *aequum et bonum*. Professor Winfield is on surer ground when he contends that, even if *aequum et bonum* cannot be regarded as the foundation in English law of an action to recover an unjust benefit, it does nevertheless provide a standard by which it may be judged whether in such cases a contract to refund should be implied or not.[96] But this only takes us part of the way towards a recognition of the doctrine of unjustified enrichment. An English Court can only deal with cases in which *indebitatus assumpsit* would lie, and there are consequently many instances of an unjustified enrichment in which the impoverished party is left without a remedy because no contract can be implied in the circumstances of the case. Space does not permit of an exhaustive enumeration of such cases, but reference may perhaps be made to a few of them. In *Cowern* v. *Nield*[97] an infant was able to pocket a cheque for £35 and to snap his fingers at a person who had purchased from him goods which were not delivered in accordance with the contract of sale. In *Leslie* v. *Sheill*[98] another infant was permitted to retain money which he had succeeded in borrowing by a false statement as to his age. These cases no doubt suggest that the law of infancy stands in great need of a thorough spring cleaning, but they also seem to negative the existence of any general theory of unjustified enrichment. In *Paquin* v. *Beauclerk*[99] a tradesman who had supplied a married woman with dresses was unable to obtain payment because the wife was able to take advantage of a somewhat ambiguous proviso in the Married Women's Property Act of 1893. In *Bilbie* v. *Lumley*[1] it was held that a person who pays under a mistake of law cannot get his money

[94] Maclachan, *op. cit.* p. 529, note (1). See, however, *per* Lord Esher in *Burton* v. *English* (1883) 12 Q. B. D. p. 218; *per* Lush J. in *Crooks* v. *Allan* (1879) 5 Q. B. D. 38.

[95] Carver, Carriage by Sea, §§ 363 and 364; *per* Bramwell L.J. in *Wright* v. *Marwood* (1881) 7 Q. B. D. at p. 67.

[96] Winfield, *op. cit.* p. 139.

[97] [1912] 2 K. B. 419.

[98] [1914] 3 K. B. 607.

[99] [1906] A. C. 148.

[1] (1802) 2 East 469. The earliest case in which the point seems to have been raised is *Lowrie* v. *Bourdieu* (1780) 2 Doug. 469; and see also *per* Willes J., *King* v. *Shipley* (1784) 3 Doug. 177. Professor Keener seems to be correct in attributing the origin of the rule to Lord Ellenborough's *dictum* in *Bilbie* v. *Lumley*, *supra*. See Keener, Law of Quasi-Contracts, p. 85.

back. This is a modern rule which came into existence about the end of the eighteenth century and appears to be based on a confusion of thought and to have little to recommend it. The maxim '*ignorantia iuris haud excusat*' may, perhaps, have produced in this instance similar baleful results to those which are to be attributed to the brocard '*actio personalis moritur cum persona.*' On the other hand, English law appears to be adequate to meet a great many of the cases which on the Continent would be dealt with under the heading of unjustified enrichment. Dr. Walton, in his learned treatise on the Egyptian Law of Obligations, has made this clear.[2] The list which he gives could be amplified, more particularly as regards those decisions which do not rest on the theory of implied contract, but considerations of space forbid reference to more than a few of such cases. In *Valentini* v. *Canali*[3] an infant was not allowed to escape liability for the benefit which he had derived from the occupation of a furnished house. In *Lawford* v. *Billericay Rural Council*[4] a corporation was made to pay for services which had been rendered even though the contract of employment was not under seal. In *Banque Belge* v. *Hambrouck*[5] equity came to the rescue, and a person who for an immoral consideration had come into possession of a sum of money obtained from the true owner by means of the fraud of a third party was compelled to refund the amount which she had received, although the money had been paid into her bank account and the relationship of banker and customer had intervened. Then again, in *Liggett* v. *Barclays Bank*[6] the equitable doctrine of subrogation was applied to prevent the plaintiffs from acquiring a profit in the shape of an unjustified enrichment.

But it is difficult to get away from the fact that English law is sometimes powerless to intervene in cases of unjustified enrichment. As Lord Macnaghten has said, 'It is a public scandal when the law is forced to uphold a dishonest act.'[7] Yet this is exactly what has taken place in *Leslie* v. *Sheill*[8] and other cases of that type. It is not possible to impute the blame for this situation entirely to the survival of the influence of the old

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[2] Vol. ii, p. 203 *passim.*
[3] (1889) 24 Q. B. D. 166.
[4] [1903] 1 K. B. 772. See now section 266 of the Local Government Act, 1933.
[5] [1921] 1 K. B. 321. As to whether the Common Law may also be effective in such a case, see the judgment of Atkin L.J. *ibid.* at p. 335.
[6] [1928] 1 K. B. 48.
[7] *Nordenfeldt* v. *Maxim Nordenfeldt Co.* [1894] A. C. at p. 573.
[8] *Supra.*

forms of action. They have no doubt been an important factor in curtailing the length of the arm of the law, but the real reason for the existence of many cases of hardship founded on arid technicalities lies in the absence of any general rule that a man ought not to be allowed to retain money or money's worth which he has obtained in circumstances which render it unreasonable and unfair that he should be allowed to keep it. It is, perhaps, unlikely that the continental doctrine could be adapted so as to work in the environment of the other rules of our Common Law, but we can find much in the experience of the French Courts which will be of service to us if and when the time comes to endeavour to remove the injustices which admittedly arise from the present state of our law.

The process of reform will not, in this instance, be easy to carry out. Regarded from the point of view of English law the difficulty in dealing with cases of unjustified enrichment arises to a considerable extent from the fact that the principles underlying the Civil Law doctrine of *negotiorum gestio* are alien to our modes of legal thought. We have taken up the position that a man ought not to be made to accept a benefit or to incur a liability against his will. He must, as Brett M.R. said in *Leigh* v. *Dickeson*,[9] be at liberty to accept or reject the advantage which an enrichment confers on him, and the mere fact of his having accepted that which he was not at liberty to refuse is no evidence of his adoption or ratification, and the one who has made the voluntary payment must suffer for his generosity. But this is only one aspect of the matter. The principle of *aequum et bonum*, even if it has survived the blow which it received in *Sinclair* v. *Brougham*,[10] is moribund. It has been criticized on the ground that it involves applying a 'vague jurisprudence'[11] and may connote 'sloppiness of thought.'[12] This may be strong language to use, but it certainly emphasizes the fact that in our English system it is dangerous to talk about 'natural justice' or '*aequum et bonum*' unless we are quite clear as to what we mean by those terms. Our judges, unlike the French judges in 1892, are not in the happy position of being able to deal with the question without regard to existing rules of positive law. Our law says, on the one hand, that there is no such thing as *negotiorum gestio*; on the other hand, subject, possibly, to a few exceptions, it confines

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[9] (1885) 15 Q. B. D. 60.
[10] *Supra.*
[11] *Per* Hamilton L.J. in *Baylis* v. *Bishop of London* [1913] 1 Ch. at p. 140.
[12] *Per* Scrutton L.J. in *Holt* v. *Markham* [1923] 1 K. B. at p. 523.

the remedy for unjustified enrichment to the *indebitatus* counts including those cases in which a tort can be waived.[13]

To borrow a simile employed by Lord Atkin,[14] it may perhaps be argued that it is not altogether certain whether the Law Lords locked the door when they decided the point as it arose in *Sinclair* v. *Brougham*.[15] Professor Winfield, unless I am mistaken, contends that even if they did lock the door for the purposes of that case, they left the key hanging on a nail so that if anyone now wishes to enter he can still do so. In addition to the cases of salvage and general average, which have been referred to above, he relies on the quasi-contractual nature of actions to enforce foreign judgments,[16] and on *Baylis* v. *Bishop of London*[17] and *Edmunds* v. *Wallingford*,[18] as well as on certain cases in which a tort was waived[19] or the claim was for the recovery of money paid in respect of illegal transactions.[20] He maintains that in these instances a refund of money has been ordered without reference to any implication of a contract. The art of pleading, which has played such a prominent part in building up the Common Law, is in a sad state in these days and is going from bad to worse, but nevertheless it is not without significance that in *Baylis* v. *Bishop of London*[21] the action was to recover money paid under a mistake of fact, and that in *Edmunds* v. *Wallingford*[22] the pleader employed the counts for money had and received and for money paid at the request of the defendant, and that all these causes of action connote a fictitious contract to pay. The other cases relied on by Professor Winfield seem to have been framed in the same way or to have been proprietary in character.[23] Further, all these cases were prior in date to *Sinclair* v. *Brougham*,[24] and it is submitted that their authority is seriously impaired, if not destroyed, by the speeches of the Law Lords in that case.

On the other hand Equity—as Lord Atkin observed[25]—has

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13 *Sinclair* v. *Brougham*, *supra*.
14 *Banque Belge* v. *Hambrouck* [1921] 1 K. B. at p. 335.
15 *Supra*.
16 Winfield, *op. cit.* p. 150. This is a special case falling within the rules of Conflict of Laws, and it depends on considerations alien to English law as a whole. See British Year Book of International Law, 1932, at p. 52.
17 [1913] 1 Ch. 127.
18 (1885) 14 Q. B. D. at p. 815.
19 Winfield, *op. cit.* p. 141.
20 *Ibid.* p. 140.
21 *Supra*.
22 *Supra*.
23 *E.g.* in *Barclay* v. *Pearson* [1893] 2 Ch. 154 the action was in the Chancery Division and was brought to administer an alleged trust. *Taylor* v. *Bowers* (1876) 1 Q. B. D. 291 was an action in detinue to recover chattels.
24 *Supra*.
25 *Banque Belge* v. *Hambrouck*, *supra*.

had 'the courage to lift the latch' of the door and to provide a remedy in certain cases; but we are still faced with many instances in which a person who has been the victim of an unjustified enrichment is left without a remedy.

It is not easy to suggest a way out of the difficulty. Perhaps it may be possible to legislate and to extend the scope of the old *indebitatus* counts so as to remove the hardships which now exist if the circumstances are such as to negative the implication of a fictitious contract.[26] But the subject bristles with problems which materialize as soon as the doctrine of unjustified enrichment is applied to concrete cases. It is here that French law can help us by indicating the nature of such problems and by demarcating the area within which they are likely to arise. In default of some such guide there is a danger that attempts to revise our existing rules may either go too far or else not go far enough.

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[26] See the observations of Lord Dunedin on this aspect of the matter in *Cantiare San Rocco* v. *Clyde Shipbuilding Co.* [1924] A. C. at p. 248.

# ATTEMPTS TO COMMIT CRIMES.

J. W. Cecil Turner.

## I. Attempt in General.

'NOW people in the street,' said a learned judge in a modern case,[1] 'before they begin to think about it, think it is a very easy thing to say what amounts to an "attempt," but when you come to analyse it, it becomes a little difficult.'

The text-books tell us[2] that at Common Law every attempt to commit any indictable crime, whether that ulterior crime be a felony or a misdemeanour, is itself a misdemeanour. Professor Sayre, of Harvard, in an article in the Harvard Law Review,[3] has traced the growth of this rule which, he thinks,[4] did not take its modern comprehensive form until a judgment of Lord Mansfield in 1784 in *R.* v. *Scofield*.[5] Until that date there seems to have been no recognition of the doctrine that an attempt to commit *any* crime at all was itself a crime. At the same time it was clearly established that mere intention alone, without an act done in furtherance of it, would not be sufficient. 'So long as an act rests in bare intention, it is not punishable by our laws.'[6] But the early reports give cases long before the eighteenth century in which attempts to commit crimes were punished criminally. On what principle did these old convictions rest? To begin with, the Courts seem to have relied upon the maxim *voluntas reputabitur pro facto*. 'None of these cases, however,' says Professor Sayre,[7] 'proves that there was ever a time when . . . criminal liability could be rested upon mere intent as evidenced by an overt act rather than upon the overt act itself.'

Lord Mansfield's opinion in *Scofield's Case* was followed a few years later in *R.* v. *Higgins*,[8] a case which presents an

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1 *R.* v. *Osborn* (1919) 84 J. P. p. 63, *per* Rowlatt J.
2 *E.g.* Kenny, Outlines of Criminal Law (14th ed.), p. 84.
3 Vol. 41, p. 821.
4 *Loc. cit.* at p. 834.
5 (1784) Cald. 397.
6 *Per* Lord Mansfield at p. 402.
7 *Loc. cit.* p. 826.
8 (1801) 2 East 5.

interesting similarity to the well-known case in Roman Law discussed in both the Institutes of Gaius [9] and of Justinian.[10] Higgins was indicted for soliciting and inciting D., a servant, to steal certain property of his master, J. P. There was no allegation that D. had either consented to the proposal or had done anything towards putting it into effect. Although the charge contained no express mention of an attempt, the case was treated as one of 'an attempt to incite another to steal, an endeavour or attempt to commit a crime.' [11] Further, the Court recognized the necessity for an act in addition to a wrongful intention. 'The offence does not rest in mere intention; for in soliciting Dixon to commit the felony, the defendant did an act towards carrying his intention into execution.' [12] 'This is a charge of an act done, namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so.' [13] The Institutes discussed the case of an honest slave who informed his master Maevius that he had been solicited by Titius to steal the property of Maevius. On his master's instructions he took the property to Titius in order that Titius might be sued for stealing the property (*furtum*) and for corrupting the slave (*servi corruptio*).[14] Gaius had no doubt that neither of these actions could, on the facts, be sustained. There was no *furtum* because the owner had consented to the handing over of the property, while obviously the slave had not been corrupted. This argument, however, did not appeal to Justinian, or, rather, his compilers, who provided [15] that both the *actio furti* and the *actio servi corrupti* should be allowed in such a case, as a deterrent from such conduct. This was an unsatisfactory decision, because there is nothing to show that Justinian appreciated the difference between the actual commission of an offence and the attempt to commit it. The explanation, perhaps, is that Justinian did not regard that difference as of any importance, and considered that a man against whom wrongful intent was once established should not have his liability reduced by the fact that, for reasons not within his own control, he failed to achieve what he intended. He states that the *actio furti* is allowed '*propter dolum suum*' and

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[9] G. iii, 198.
[10] Inst. 4.1.8.; C. 6.2.20.
[11] *Per* Lawrence J. at p. 21.
[12] *Ibid.*
[13] *Per* Le Blanc J. at p. 23.
[14] Cf. the American case *People* v. *Jaffe*, 185 N. Y. 497; 41 Harvard L. R. 853.
[15] Note 10, *ante*.

the *actio servi corrupti* '*propter vitium suum*,' but it is not possible to discover whether Justinian intended to lay down any general principle of liability which could be applied to other delicts. Roman Law, therefore, in this case gives us no assistance to a definition of attempts.

It is clear that at any rate since the beginning of the nineteenth century the general doctrine as stated above has been established as part of our Common Law, and it also seems that the offence of attempting to commit a crime must satisfy the requirements of Common Law as to *mens rea* and *actus reus*. The difficulties of the matter, however, do not end there. The establishment of *mens rea* by evidence has been treated as no harder in 'attempts' than it is in any other crimes, and has elicited no special discussion, although, as we shall see, it is the gist of the offence. But the enunciation of a plain test for deciding whether a sufficient *actus reus* has or has not been performed is a task which many judges and writers have felt themselves unable to accomplish. 'It is difficult,' said Jervis C.J., in 1855,[16] 'and perhaps impossible, to lay down a clear and definite rule to define what is, and what is not, such an act done, in furtherance of a criminal intent, as will constitute an offence; at all events I shall not attempt to do so.' In 1899 Darling J., as he then was, said[17]: 'I do not attempt to define what is a criminal attempt.' The late Professor Kenny defined attempts as consisting in 'some physical act which helps, and helps in a sufficiently "proximate" degree, towards carrying out an indictable crime that is contemplated. But no abstract test can be given for determining whether an act is sufficiently proximate to be an "attempt."'[18] Stephen's Digest of the Criminal Law states[19] that 'an attempt to commit crime is an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission if it were not interrupted'; but adds: 'The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case.' 'It is thus manifestly impossible to lay down any mechanical or hard and fast rule for the drawing of the line between preparation and indictable attempts.'[20] Such confessions of impotence are very disheartening to the student who reads them. Nor is the difficulty

[16] *R.* v. *Roberts*, Dears. 539 at p. 550.
[17] *R.* v. *Brown*, 63 J. P. 790.
[18] *Op. cit.* p. 82.
[19] (7th ed.), art. 67.
[20] 41 Harvard L. R. p. 846.

removed by elaborate statements which, while purporting to give a definition, prove on analysis to mean no more than that the act 'must be sufficiently proximate' or 'must not be too remote.' Examples of such statements are the following:

'So I think the proper definition of an attempt is when a man commences to do the very thing and tries to finish it, or begins to try to finish it, and then either stops because he changes his mind afterwards, or is prevented afterwards, or finds that he cannot do it. But if he does not begin to do the very thing, however morally culpable he may be, he does not attempt.'[21]

'There is no real difficulty in formulating the principle to be applied. The safe guide is that laid down by Parke B. in *Eagleton*[22]; he says: "The mere intent to commit a misdemeanour is not criminal. Some act is required, and we do not think all acts towards committing a misdemeanour indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." '[23]

'To constitute an attempt the act done must be immediately connected with the commission of the offence.'[24]

'No act is indictable as an attempt . . . unless it is a step towards the execution of the criminal purpose, and is an act directly approximating to, or immediately connected with the commission of the offence which the person has in view.'[25]

The examples could be multiplied but those cited are enough. None of them provides either an adequate definition of attempt, nor an adequate test for determining the nature of the necessary *actus reus*. It is the aim of the present article to suggest what may be such a test. But first it is necessary to appreciate what are the respective functions of the judge and jury in this crime of attempt, a point which the leading text-books do not emphasize, and on which some of the judgments of the Courts are a little ambiguous.[26] The *mens rea* required is an intent to commit the complete crime which the accused is charged with attempting.[27] It is for the jury to decide whether the accused did have that intent. But the question whether his conduct amounted to a sufficient *actus reus* is a matter of law for the judge. 'The question whether an act done, or omitted, with

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[21] *R.* v. *Osborn* (1919) 84 J. P. 63, *per* Rowlatt J.
[22] *R.* v. *Eagleton* (1855) C. C. R.; 24 L. J. M. C. at p. 166.
[23] *R.* v. *Robinson* (1915) 11 Cr. App. R. 124, *per* Reading L.C.J. at p. 129.
[24] Archbold, Criminal Procedure, Evidence and Practice (28th ed.), p. 1442.
[25] Russell on Crimes (8th ed.), p. 145.
[26] *E.g. R.* v. *Linneker* (1906) C. C. R.; 75 L. J. K. B. 385; [1906] 2 K. B. 99.
[27] See 41 Harvard L. R. pp. 837—842.

intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.' [28] In *R.* v. *Taylor*,[29] in which the accused was charged with attempting to set fire to a stack of corn, Pollock C.B.[30] told the jury that if they thought that the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, in his opinion this was in law a sufficient attempt to set fire to the stack. See also *R.* v. *Landow*,[31] where a conviction for attempted procuration was quashed on the ground that the jury were not properly directed as to the difference between an attempt and an intention or a mere idle threat. It is, then, for the jury to find what exactly were the acts done by the accused, and for the judge to decide whether those acts are sufficient to constitute the *actus reus*. Now in attempt it is essential that the relation between the *actus reus* and the *mens rea* should be clearly appreciated. In the case of most Common Law crimes, *actus reus* is a result, forbidden by law, and produced by human conduct.[32] When this has been proved it usually raises the presumption of the existence of an adequate *mens rea*,[33] but it is permissible to prove *mens rea* by other means than by that presumption so created by the facts of the *actus reus*, for example, by a subsequent confession.[34] In the crime of attempt the position is different. The *actus reus* in this case is in itself not necessarily harmful nor forbidden by law; for example, the striking of a match near a haystack is not in itself an act forbidden by law, yet it may well be a sufficient *actus reus* in the crime of attempting to set fire to the stack.[35] Again, it is not in itself a crime if a clerk takes a wax impression of his employer's safe key, and makes a key from it, and secretly inserts that key in the lock after he thinks his employer has left the office; but this evidence would probably establish a sufficient *actus reus* of attempting to steal property in the safe. 'The *intent* may make an act, innocent in itself, criminal.' [36] The *actus reus*, however, may happen to be forbidden in itself, in which case it also forms the *actus reus* of another, completed, crime. For example, to fire a pistol at a man would be a suffi-

[28] Draft Criminal Code, art. 74.
[29] (1859) 1 F. & F. 511.
[30] At p. 512.
[31] (1913) 23 Cox 457, C. C. A.
[32] See C. L. J. 1933, vol. v, 1, p. 62.
[33] Kenny, *op. cit.* p. 41.
[34] See also Larceny Act, 1916, s. 43.
[35] *R.* v. *Taylor* (1859) 1 F. & F. 511.
[36] *R.* v. *Scofield* (1784) Cald. 397, *per* Lord Mansfield at p. 400.

cient *actus reus* of attempt to murder and would also constitute an assault. Again, malicious damage to property may be committed in an attempted burglary.

The important point is, however, that the *actus reus* in attempt need not be forbidden in itself. It follows, therefore, that whereas in most crimes it is the *actus reus*, the harmful result, which the law desires to prevent, while the *mens rea* is only the necessary condition for the infliction of punishment on the person who has produced that harmful result, in attempt the position is reversed, and it is the *mens rea* which the law regards as of primary importance and desires to prevent, while a sufficient *actus reus* is the necessary condition for the infliction of punishment on the person who has formed that criminal intent. It may perhaps be permissible to emphasize this by saying that in most crimes the *mens rea* is ancillary to the *actus reus*, but in attempt the *actus reus* is ancillary to the *mens rea*. Possibly there may be, after all, a certain truth in the old phrase *voluntas reputabitur pro facto*.

If then, in attempt, the sole purpose of the *actus reus* is to establish the existence of *mens rea*, it is necessary to decide (1) what is the nature of that *mens rea* and (2) what will be a sufficient *actus reus*.

### (1) *The* mens rea *in attempt.*

It is a broad rule of our Common Law that *mens rea* can be either the state of mind of the man who intends the consequences of his conduct, or the state of mind of the man who realizes what the consequences of his conduct may be and who, although he does not desire those consequences, is reckless or indifferent to them.[37] In either case, if those consequences amount to the *actus reus* of a complete crime, he can be found guilty of that crime. But supposing his course of conduct is for some reason checked before those final consequences occur, can he also be found guilty, in either case, of 'attempting' that crime? The answer is that he cannot. The crime of attempt by its nature requires a *mens rea* of the former kind exclusively; there must be proved a specific intent to commit that crime.

### (2) *The* actus reus *in attempt.*

We have seen already that statements as to proximity and remoteness which abound in the authorities do not provide a means by which in any given case it may be possible to decide

[37] See C. L. J. 1933, vol. v, 1, pp. 63—66.

whether a sufficient *actus reus* has, or has not, been performed. In *R.* v. *Robinson*[38] the judgment of the Court was rested on the principle in *R.* v. *Eagleton*,[39] but that principle is not adequate, so far as it is cited in *R.* v. *Robinson*; as a matter of fact, however, Parke B., in *R.* v. *Eagleton*, went further than, according to the more modern authorities,[40] has since been held to be necessary, for he appears to have held the opinion that there would be no sufficient *actus reus* unless the accused had done every act which, so far as he was concerned, it was necessary to do in order to effect the crime he intended. Eagleton had been convicted of attempting to obtain money by false pretences. He had supplied to poor persons having out-relief loaves of bread in return for relief tickets, and had sent these tickets to the relieving officer in support of his claim for payment, as proof that he had supplied loaves of the full weight of $3\frac{1}{2}$ lbs. whereas he had in fact fraudulently supplied loaves of less weight. In delivering the judgment of the Court for Crown Cases Reserved, Baron Parke, after the statements above quoted,[41] continued: 'and if in this case . . . any *further step* on the part of the defendant had been necessary to obtain payment, as the making out of a further account . . . we should have thought that the obtaining credit with the relieving officer would not have been sufficiently proximate to the obtaining the money. But . . . in this case no other act on the part of the defendant would have been required. It was the last act *depending upon himself* towards the payment of the money, and therefore it ought to be considered as an attempt.'

The truth lies between this unnecessarily narrow doctrine and the unsatisfactory vagueness of the definitions which have already been considered. It is submitted that the required test can be formulated as follows:

*The* actus reus *of an attempt to commit a specific crime is constituted when the accused person does an act which is a step towards the commission of that specific crime, and the doing of such act can have no other purpose than the commission of that specific crime.*

On this it may be remarked:

(1) An act which does not *contribute* to the commission of the crime cannot be counted as part of the *actus reus*, even though it may be excellent evidence of *mens rea*. For example,

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[38] 11 Cr. App. R. 124; [1915] 2 K. B. 342; *ante*, p. 233.
[39] (1855) 24 L. J. M. C. 158; Dears. 515; *ante*, p. 233.
[40] *E.g. R.* v. *White* [1910] 2 K. B. 124.
[41] *Ante*, p. 233.

a letter written by the accused to a friend, stating that he intends to murder X by stabbing him on the 16th of January may be good evidence of his *mens rea* in buying a dagger on the 15th of January, but is not evidence at all to show that the purchase of the dagger was a sufficiently 'proximate' act to constitute an attempt to murder X, for the letter does not contribute in any way to the commission of the offence intended, *i.e.*, the murder of X. Evidence of acts which do not amount to a sufficient *actus reus* cannot be supplemented by evidence, however overwhelming, which merely goes to establish *mens rea*. A good illustration of this is provided by the case of *R.* v. *Robinson*,[42] where a conviction for attempting to obtain money by false pretences from Lloyd's underwriters was quashed on the ground that there was no sufficient act on the part of the appellant although he confessed that his object was to obtain money fraudulently under his policy. The facts of the case briefly were that the appellant, a jeweller, having insured his stock against theft and burglary, concealed some jewellery in a recess under his safe, then tied himself up with string and an apron and called for help. On a policeman bursting open the door he told him that he had locked all his jewellery, which he valued at £1,500, in the safe and had gone upstairs where he was knocked down by someone from behind, and left tied up. The safe was found open and empty. The policeman was not satisfied with the story and took R. to the police station, and when he was told that the jewellery had been discovered under the safe he confessed that he hoped to get money from the underwriters in this way. There was, however, no evidence of any communication between the appellant and the underwriters, or any agent of theirs. In this case the confession was an 'act' of the accused, and it clearly proved his *mens rea*, but it did not contribute to the commission of the crime at which he was aiming, and therefore was not part of the *actus*.

(2) If the acts of the accused, taken by themselves, are unambiguous, and cannot, in reason, be regarded as pointing to any other end than the commission of the specific crime in question, then they constitute a sufficient *actus reus*. In other words, his acts must be *unequivocally referable* to the commission of the specific crime. They must, as the late Sir John Salmond said,[43] 'speak for themselves.' If the example may be permitted, it is as though a cinematograph film, which had so far depicted merely the accused person's acts without stating

[42] (1915) 11 Cr. App. R. 124.
[43] Jurisprudence (6th ed.), p. 346.

what was his intention, had been suddenly stopped, and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question then the accused has done what amounts to an 'attempt' to attain that end. If there is more than one reasonably possible answer, then the accused has not yet done enough. It will make no difference if the alternative ends which the accused's conduct might indicate are themselves crimes, for he is to be charged with attempting a *specific* crime, not with attempting *some* crime. Take as an example the case of *R.* v. *Robinson*[44] already mentioned. For the reasons stated his confession must be disregarded when the question of *actus reus* is under consideration. Eliminating the confession, we are left with evidence of conduct on his part which, considered by itself, may well be regarded as suggesting *some* fraudulent end, but does not unequivocally point to obtaining money from the underwriters, for it is conceivable that he might have been going to defraud his creditors, or the revenue, or even that he was seeking an advertisement.

In this connexion we may note an imaginary case put by the late Professor Kenny as an illustration of *mens rea* without any *actus reus*. 'If a man takes an umbrella from a stand at his club, meaning to steal it, but finds that it is his own, he commits no crime.'[45] Students are sometimes puzzled by this, and ask why he could not be convicted of 'attempting' to steal the umbrella.[46] The answer is that *the facts stated* merely present the picture of a man going to take, and actually taking, his own umbrella, not the umbrella of another person. They do not suggest any criminal intention at all, much less the specific intention of stealing an umbrella. We are not told the evidence by which his *intent* to steal another's umbrella is proved; such evidence *might* be found in some other act done at the time by the taker, and that act would then, together with the evidence that we are given, constitute a sufficient *actus reus* of attempting to steal another person's umbrella.

(3) It is submitted that although the foregoing test has not been expressly formulated in any judgment, it has in fact been acted upon in every case.

'In soliciting Dixon to commit the felony, the defendant did an act towards carrying his intention into execution.'[47]

'The prisoner raised his arm and pointed a pistol at another

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[44] (1915) 11 Cr. App. R. 124.
[45] *Op. cit.* p. 38.
[46] Baron Bramwell asked this very question of counsel in *R.* v. *Collins* (1864) 9 Cox at p. 498.
[47] *R.* v. *Higgins* (1801) 2 East 5, *per* Lawrence J. at p. 21.

person, and he had his hand upon the trigger. So far as raising his arm and pointing the pistol were concerned, he did all that he could do to discharge it, and then other persons interfered, and took the pistol from him, and the attempt ended there. I should think it reasonably clear to most ordinary minds that there had been an attempt to do what was prevented from being done by the interference of third persons.' [48]

There are indeed one or two *dicta* which come very near to an express formulation. 'But in this case no one can doubt that unless the transaction had been interrupted as it was, the prisoner would have actually carried away the meat.' [49] 'Appellant went to two different people, made false representations as to his business being flourishing and tried to get them to apply for situations under or in that business, telling them they would have to invest £100 either in debentures or preference shares. They did not apply and were not asked directly to supply the £100. But what was he making those representations for? They were not mere preparation. He must have made them to get the £100.' [50] In *Eagleton's Case* [51] Bulwer, counsel for the Crown, *arguendo*, said: 'The returning the ticket was not an indifferent act which may mean one thing and may mean another.' In *R.* v. *Roberts* [52] Parke B. said: 'I do not see for what lawful purpose the dies of a foreign coin can be used in England, or for what purpose they could have been procured except to use them for coining,' and Wightman J. said,[53] 'in truth the prisoner could have had no other object than to commit the offence.' It is submitted that in this *dictum* of Wightman J. the true test of the *actus reus* of 'attempts' is contained.

(4) It would be of assistance to the proper solution of difficult cases of alleged attempts, if no extrinsic evidence of the *mens rea* of the accused, *e.g.* such as a confession, were to be considered unless and until a sufficient *actus reus* has first been established. A similar postponement of evidence has been provided, for example, in the case of the crime of receiving stolen property; by the Larceny Act, 1916, s. 43, sub-s. 1 (b), it is in effect provided that it must first be proved that the prisoner had taken into his possession the stolen property before evidence can be given, for the purpose of proving his guilty

[48] *R.* v. *Duckworth* [1892] 2 Q. B. *per* Lord Coleridge C.J. at p. 87.
[49] *R.* v. *Cheeseman* (1862) 31 L. J. M. C. at p. 90, *per* Blackburn J.
[50] *R.* v. *Laitwood* (1910) 4 Cr. App. R. 248, *per* Pickford J. at p. 252.
[51] (1854) Dears. at p. 525.
[52] (1855) Dears. 539.
[53] At p. 551.

knowledge, of his having been previously convicted. There is, of course, no such rule or practice operating in our Courts in cases of attempt, but students would be well advised to apply their minds in this way to the cases offered for their consideration.

(5) So long as a sufficient *actus* of attempt has been done, it does not matter what happens afterwards. The attempt may be successful or unsuccessful. If successful the *offence* may merge in the greater crime,[54] but that does not alter its nature.

In *R.* v. *Hensler*[55] the defendant was convicted of attempting to obtain money by false pretences made in a begging letter written to a man, who, knowing the pretences to be false, sent the money and then prosecuted. Here the money was actually obtained, but the offence of attempt did not merge because the major crime was of course not committed, as it was not *by* the false pretences that the money was obtained. A similar case is *R.* v. *Light*,[56] in which the accused had been found guilty of attempting to obtain money by false pretences from the prosecutor, who had not been misled by them.

(6) Mistake.

(i) Mistake of law.

Mistake of law does not require a lengthy discussion. When it would be a defence to a charge of committing a certain crime, it will also be a defence to a charge of attempting to commit that crime; for example, in a case falling within the rule as to 'a claim of right made in good faith' under the Larceny Act, 1916, s. 1, sub-s. 1.

In other respects the accused person's knowledge or ignorance of law is immaterial. If what he intended to do is not a crime, then an attempt by him to do it cannot be a crime. But in cases where there is a rule that a person, because of some special circumstance in his case, cannot be found criminally guilty of an act he has done which would normally be a crime[57] (*e.g.* rape by a boy under fourteen), it is not certain that he cannot be convicted for an attempt if he had merely tried to do it.[58]

(ii) Mistake of fact.

Mistake, as such, is an operation of the mind. But if the state of a man's mind be as much a fact as the state of his

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[54] *R.* v. *Higgins* (1801) 2 East at p. 20, *per* Grose J.; *R.* v. *Meredith* (1838) 8 C. & P. 589.
[55] (1870) C. C. R.; 11 Cox 570.
[56] (1915) 11 Cr. App. R. 111.
[57] *R.* v. *Waite* [1892] 2 Q. B. 600.
[58] See *dicta* in *R.* v. *Williams* [1893] 1 Q. B. 320.

digestion, then it may be one of the facts which can be taken into account in deciding whether his acts amount to the *actus reus* of attempt. Evidence of his mistake of fact may give a precise meaning to acts of his which, without such evidence, would be ambiguous or inconclusive on the question of the end to which those acts were directed. A mistake may induce a person to act in a certain way. It is necessary to look at the acts of the accused, and at the circumstances in which those acts have taken place, and it is immaterial whether his acts were induced by a correct knowledge of fact, or by a mistaken idea of fact; then, if the picture thus obtained is that of a man, who, beyond reasonable doubt, was going on to a certain result, and if that result, when achieved, would be the *actus reus* of a specific crime, we can say that he has reached a sufficient *actus reus* of 'attempting' that specific crime. If, on the other hand, the picture obtained is not that of a man who, beyond reasonable doubt, was aiming at the result in question, then he is not guilty of attempt.

If his mistake has caused him to fall short of a sufficient *actus reus*, this is perhaps lucky for him; many a man has been saved from crime by error. On this view we need not trouble ourselves with elaborate speculations as to theories of punishment, as to moral and psychological considerations, or as to the endangering of social or public interests, and the like ideas,[59] unless, indeed, we desire to discuss whether our law should be altered so as to include punishments for *mens rea* alone when there is no *actus reus*. But our present purpose is to discuss our Common Law as it is, not as it might be.

It may be, however, that evidence of the accused person's mistake of fact, as has been stated, gives a special point to other evidence. For example, if a man mistakenly believes that he has the means of carrying out a crime, evidence of his mistake may be material. 'If you try to burst open the very best kind of steel safe with a wholly inefficient instrument, but really try to do it . . . although you could call all the safe-makers in the world to say that the safe never could have been opened with that tool, still you are guilty of the attempt although you never could have completed it.'[60] Again, if it is proved that X asked a chemist for a certain poison, and that the chemist by accident or design supplied him with sugar instead of the poison, and if it is further proved that X secretly put that same sugar in Y's

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[59] See, for example, 41 Harvard L. R. pp. 848—850.
[60] *R.* v. *Osborn* (1919) 84 J. P. 63, *per* Rowlatt J.

food, then X committed a sufficient *actus reus* of attempting to murder Y. The evidence of his asking for poison and of his putting what the chemist gave him into Y's food gives a precise meaning to what otherwise would merely be the inconclusive act of feeding Y secretly with sugar. The whole of the evidence gives a clear picture of a man whose acts pointed unequivocally to the administering of a dangerous poison to Y, and raises the presumption of *mens rea, i.e.* that X intended to murder Y.

It will be appreciated that in discussing cases such as these the question of impossibility arises, and this question has given rise to so much doubt and controversy that it calls for treatment in a separate section, although it will be seen that it falls within the principles already enunciated.

## II. Attempts to do what is impossible.

As we have seen, an attempt involves an intention to effect a specific result. No man either does, or can *intend to do,* that which he believes it to be impossible for him to do. Therefore no man can, or does, *attempt to do* that which he believes it to be impossible for him to do. It follows that in every case where it turns out that it was impossible for a man to have done that which he attempted, he must have been acting under some mistake. It must also be noted that impossibility may be of two kinds, relative or absolute. That is to say it may be impossible to the man himself in the circumstances of his case to achieve the end he desires, for example, where a man tries to open a safe with the wrong key, or by mistake administers a harmless powder instead of poison; or on the other hand it may be impossible for anyone to achieve the end he desires, for example, to steal from an empty pocket, or to kill a man already dead.

It was at one time thought that a person could not be guilty of attempting that which was impossible, although it does not appear that the judgments or the text-books expressly drew the distinction between relative and absolute impossibility above mentioned. Cases relied upon for this proposition were *R.* v. *M'Pherson*[61] and *R.* v. *Collins*.[62]

It is now generally held,[63] however, that this doctrine has been overruled by the cases of *R.* v. *Brown*[64] and *R.* v. *Ring*,[65]

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[61] (1857) 1 D. & B. 197; 7 Cox 281.
[62] (1864) 33 L. J. M. C. 177; 9 Cox 497.
[63] *E.g.* Kenny, *op. cit.* p. 83; Archbold, *op. cit.* p. 1443.
[64] (1889) C. C. R.; 59 L. J. M. C. 47; 24 Q. B. D. 357; 16 Cox 715.
[65] (1892) C. C. R.; 61 L. J. M. C. 116; 17 Cox 491.

although there is not wanting criticism of the decisions in these cases, and of the conclusions usually drawn from those decisions.[66]

But some of those authorities who accept the view that the cases of *M'Pherson* and *Collins* have been overruled, consider that there may yet be some forms of impossibility which will prevent an attempt from being criminal.[67] It is therefore necessary to examine the cases briefly.

M'Pherson was indicted for breaking and entering a dwelling-house and stealing certain specified goods therein. There was *no* count for attempting to steal. It appeared in evidence that the goods specified had already been stolen and removed from the house by other persons before the prisoner broke and entered. Prisoner had in fact stolen nothing before he was disturbed and apprehended, although there were other goods left in the house which he could have stolen. It was contended that on this indictment he could be found guilty (under 14 & 15 Vict. c. 100, s. 9) of attempting to steal the goods. The jury found him guilty 'of breaking and entering the dwelling-house of the prosecutor and attempting to steal his goods therein.' The case was reserved, and argued before five judges, and the conviction was quashed. A study of the reports shows that although the question of impossibility was mentioned the case was not decided upon that point at all, but because certain specific goods were mentioned in detail in the indictment and the jury had found him guilty of attempting to steal other goods. A contention by counsel that the description of specific goods in the indictment was mere surplusage was overruled.[68] 'The jury have found him guilty of attempting to steal the goods of the prosecutor, but not the goods specified in the indictment.'[69] 'Though it is found that there were other articles of the prosecutor's there, an attempt to steal them is not an attempt to steal the specified goods, of which alone he could be convicted upon this indictment.'[70] 'If you indict a man for stealing your watch you cannot convict him of attempting to steal your umbrella.'[71] The chief references in the case to impossibility are contained in a passage in the judgment of Cockburn C.J., 'if . . . the proof fails to establish the completion of the offence, but makes

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[66] *E.g.* Pritchard's Quarter Sessions Practice (2nd ed.), p. 900, Appendix D.
[67] *E.g.* Kenny, *op. cit.* (10th ed.), p. 82, Note A; Stephen, *op. cit.* p. 53, Illustration (11).
[68] 7 Cox at p. 285, *per* Bramwell B.
[69] 1 D. & B. *per* Cockburn C.J. at p. 203.
[70] 7 Cox, *per* Coleridge J. at p. 284.
[71] 7 Cox at p. 284.

out an attempt, the prisoner may be convicted of the attempt; but that means an attempt which, if successful, would have been the offence charged; and here the attempt never could have ended in the complete offence charged,' and in two characteristic interjections by Bramwell B. during the argument: 'Can he be convicted of attempting to commit that which was an impossible offence?' [72] and 'The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal, appeared to me at first plausible: but suppose a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be?' [73] The answer to Baron Bramwell's question is that upon the principles advanced in the present article, if the only evidence is that A shot or struck at a post, he could not be convicted; not because it was impossible to kill his enemy but because that evidence does not indicate an intention to kill anyone. But if there is evidence of other acts by A which shows that A thought the post was his enemy, then he could be convicted, although his aiming at the post by mistake made it quite impossible that he should kill the man.

It is submitted that in *R.* v. *M'Pherson* the Court failed to emphasize one clear line of defence, which was that the prisoner had no intent to steal the specific goods. It was agreed that if he had been charged with 'attempting to steal such goods as were left in the house when he entered' he could have been convicted.[74] But as specific goods were mentioned, it was necessary that it should be proved that he intended to steal those specific goods, and there was no evidence that he knew of their existence.

In *R.* v. *Collins* [75] the point of impossibility was definitely taken. Collins and his confederates were charged with attempt to commit larceny. Evidence showed that Collins put his hand in the gown pocket of a lady and the others abetted. The lady, whose name was not taken, had said 'No' when a police witness had asked her if she had lost anything. The accused were convicted and the case was reserved for the Court for Crown Cases Reserved, who quashed the conviction on the ground that the question whether there was anything in the pocket was not left to the jury, and that an attempt to commit a felony could only be made out when, if no interruption had taken place, the

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[72] 7 Cox at p. 283.
[73] 1 D. & B. at p. 201.
[74] 7 Cox at pp. 284-5, *per* Willes J.
[75] (1864) 33 L. J. M. C. 177; 9 Cox 497.

attempt could have been carried out successfully. 'It appears to me that the case is materially governed by *The Queen* v. *M'Pherson*. An attempt to commit felony can only in point of law be made out where, if no interruption had taken place, the attempt could have been carried out successfully, so as to constitute the offence which the accused is charged with attempting to commit.'[76] As *R.* v. *M'Pherson* was not decided upon the point of impossibility it would seem that *R.* v. *Collins* must rest merely on the *dicta* in the former case.

In *R.* v. *Brown*[77] it appeared that the prisoner, a boy, had been convicted, on confession, before Lord Coleridge C.J., of an attempt to commit offences contrary to 24 & 25 Vict. c. 100, s. 61. Having been subsequently informed, however, that in an unreported case, *R.* v. *Dodd*, in 1877, it had been held by the Court for Crown Cases Reserved that a duck was not an animal within that section of the Act, his Lordship reserved the case for the Court for Crown Cases Reserved, where it was discussed without argument by counsel. In delivering the judgment of the Court, Lord Coleridge stated the above facts and added that he had consulted some of the judges in *R.* v. *Dodd*, and that they remembered that the conviction in that case was not quashed on the ground that a duck was not an animal but on the ground of impossibility, on the authority of *R.* v. *Collins*. 'Some of the judges, I know, yielded with great reluctance to the authority of *R.* v. *Collins*, and thought that decision was wrong. In this case' [*i.e. R.* v. *Brown*] 'it would seem on the question of fact that the ground of the decision in *R.* v. *Dodd* fails, because I should suppose it is obvious that as a fact the offence could be committed by the boy.[78] We are all, therefore, of opinion that *R.* v. *Dodd* is no longer law. It was decided on the authority of *R.* v. *Collins* and that case, in our opinion, is no longer law.'[79]

The inclusion of the word 'therefore' is curious, and it is clear that, as there was no question of impossibility in *Brown's Case*, the validity of *R.* v. *Collins* was not really before the Court.

The facts of *R.* v. *Ring*[80] were almost identical with those of *R.* v. *Collins*. Ring and his confederates were proved to have endeavoured to pick pockets, but there was no evidence that

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[76] 33 L. J. M. C. at p. 178, *per* Cockburn C.J.
[77] (1889) 59 L. J. M. C. 47.
[78] See 16 Cox at p. 717.
[79] 24 Q. B. D. *per* Lord Coleridge C.J. at p. 359.
[80] (1892) 61 L. J. M. C. 116; 17 Cox 491.

the pockets contained anything. The case was stated with the object of ascertaining whether *R.* v. *Collins* was good law. There was no argument, and the judgment of the Court simply stated that *R.* v. *Collins* was overruled by *R.* v. *Brown*, and that it was bad law.

In cases coming before the Courts since *R.* v. *Ring* impossibility has not been regarded as a defence. For example, in *R.* v. *Brown and Others*[81] it was said 'if a person, himself believing the thing to be a noxious drug, incites a woman to take it, he is guilty, although the commission of the crime in the manner proposed is impossible.' And again, in *R.* v. *Osborn*[82]: 'It is well known that the impossibility of the thing does not prevent an attempt being made.'

From the above cases the following points seem to emerge:

(1) The cases of *M'Pherson* and of *Collins* showed no principle for the doctrine that impossibility was a defence.

(2) On the other hand, the cases of *Brown* and of *Ring* show no principle for the doctrine that impossibility is *not* a defence. But however unsatisfactory the argument, or lack of it, in these two cases may be, they have definitely declared the decision in *R.* v. *Collins* to be bad law, and that ruling has been accepted by our Courts since then.

In default, then, of any enunciation of principle by the Courts, the following submissions are made:

In the crime of attempt it is immaterial that it was impossible for the attempt to have succeeded, whether that impossibility was relative or absolute.

It is relatively impossible to obtain money by false pretences from a person who is aware of the falsity of the pretences made,[83] or to murder a person by an insufficient dose of poison,[84] and it is absolutely impossible for anyone to take money from an empty pocket,[85] yet in all these cases the person making the attempt can be found guilty. There is nothing in principle to prevent a person from being found guilty of attempting to murder by stabbing a person already dead or by shooting at a post in mistake for his enemy. If *R.* v. *Collins* rested on the authority of *R.* v. *M'Pherson*, and has been declared bad law, then the *dicta* about impossibility in *M'Pherson's Case* must share the same fate. In this connexion it may be well to consider a

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[81] (1899) 63 J. P. 790, *per* Darling J.
[82] (1919) 84 J. P. 63, *per* Rowlatt J.
[83] *R.* v. *Hensler* (1870) 11 Cox 570; *R.* v. *Light* (1915) 11 Cr. App. R. 111.
[84] *R.* v. *White* (1910) 2 K. B. 124.
[85] Note 80, *ante*.

further extract from the direction to the jury in *R.* v. *Osborn*.[86] 'And I should say, gentlemen, that if a man went into the room of his enemy . . . and thinking the man was in bed struck the pillow with a hatchet . . . but the man is not in bed but somewhere miles away, however guilty his mind may have been, he has not yet got at the thing near enough to attempt it . . . where you get this state of facts—where the man is never on the thing itself at all—it is not a question of impossibility—he is not on the job although he thinks he is; if he fires a gun at a stump of a tree thinking it is his enemy and his enemy is miles away and there is nobody in the field at all, he is not near enough to the job to attempt it; he has not begun it, he has done it all under a misapprehension.' Of this it may be respectfully said (i) that the words 'it is not a question of impossibility' are equivalent to 'the question of impossibility is immaterial,' and (ii) that the rest of the learned judge's remarks above quoted are perfectly consistent with the principles advanced in the first section of the present article. The picture of a man striking with a hatchet at an empty bed, if there is no further evidence, points just as much to insanity or *delirium tremens* on his part as to an intent to murder someone. There may however be some further evidence as there was in the American case of *State* v. *Mitchell*,[87] where the accused fired a bullet into a pillow of an empty bed; it appeared that he knew that the person he wished to kill usually slept in that bed, but did not know that his intended victim had on this occasion gone elsewhere to sleep. It can, in principle, really make no difference how far the victim is away from the spot. To say that a man 'is not near enough to the job to attempt it' is merely a vague way of saying that his conduct, having regard to the circumstances as it is proved that he understood them, does not, beyond reasonable doubt, show that he intended to kill anyone.

Thus the test to be applied is the same in all cases of attempt, whether the accused has attempted what is possible or impossible. If the acts of the accused beyond reasonable doubt indicate, and indicate only, that he intended to commit a certain definite crime, then he has performed a sufficient *actus reus* to support a charge of attempting to commit that crime.

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[86] (1919) 84 J. P. *per* Rowlatt J. at pp. 63, 64.
[87] (1902) 170 Mo. 633; 71 S. W. 175; 41 Harvard L. R. p. 851.

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# NOTES ON RECENT CASES.

BAILMENT—HIRE-PURCHASE AGREEMENT—OPTION TO PURCHASE—BAILOR DESCRIBED AS OWNER — TITLE OF BAILOR DEFECTIVE — DEFAULT BY HIRER—TITLE LATER PERFECTED—IMPLIED CONDITION OF TITLE IN HIRE-PURCHASE AGREEMENT.

KARFLEX, LTD. *v.* POOLE. [1933] 2 K. B. 251.

PLAINTIFFS bought a car from X and delivered it to defendant under a hire-purchase agreement made November 12, 1931, by which the defendant agreed to pay the plaintiffs forthwith £95 ' in consideration of the option of purchase ' ; in the agreement the plaintiffs were called ' owners ' and defendant ' the hirer,' and if the hire were determined by either party, or the owners retook possession on the hirer's default, defendant was to pay such sum as would bring his total payments to £235 ' by way of compensation for depreciation.' The deposit was to become the absolute property of the owners and credit for it would be given only if the purchase were completed or the £235 became payable for depreciation. Defendant had the usual option to purchase the car by paying instalments totalling with the deposit £309 5s. 6d., or paying the balance of that amount at any time after the agreement was executed.

The deposit was paid, but defendant failed to pay the first instalment. On December 28, 1931, plaintiffs retook the car and sued for £235 less the deposit. It was then discovered that X had no title, and on March 9, 1932, plaintiffs perfected their title by buying out the true owners. Defendant counterclaimed for the return of £95.

Acton and Goddard JJ., sitting as a Divisional Court, held that on a true construction of the agreement there was a condition that plaintiffs were owners. This condition attached to the contract from the beginning and went to the root of it, and on breach of this condition defendant's liability was at an end. The defendant was entitled to recover the £95 given in consideration of an option to purchase which plaintiffs were never in a position to give until after they had resumed possession of the car and had instituted proceedings. There had been total failure of consideration. Goddard J. made some interesting observations on hire-purchase in general. ' In my judgment,' he said at p. 263, ' where a person is letting out chattels of any description on hire-purchase, he does thereby impliedly contract, not that he will at some time become possessed of that property during the currency of the agreement, but that he is the owner of the property at the time when he lets it out.' The principle that a bailee is estopped from denying his bailor's title to the goods unless evicted by title paramount does not apply to hire-purchase. Hire-purchase contains an element of sale as well as an element of bailment, and it would be fallacious to fuse this modern commercial convenience with the hard-and-fast rules of bailment laid down centuries ago.

' I do not think that hire-purchase is an ordinary contract of bailment. . . . There are special contracts and special representations in

such an agreement, and I cannot doubt that one special representation is that the bailor is the owner of the goods at the time that he delivers them' (at pp. 264-5). Section 12 of the Sale of Goods Act, 1893 (implied condition as to right to sell), did not apply because here a different intention was shown.

It was held in *Rowland* v. *Divall* by the Court of Appeal [1923] 2 K. B. 500 that in every contract of sale of goods a breach of the condition that the seller has a right to sell may be treated as a ground for repudiating the contract and recovery of the purchase-money, notwithstanding acceptance and use by the purchaser.

Goddard J. thinks that the whole object of a hire-purchase contract is the same as that of sale, *i.e.* to pass property, and not merely possession. In spite of legal ingenuity to keep its form that of bailment, its substance is sale. The rules as to the title of the vendor-bailor are those of sale; and it is a condition that he has a good title at the time when the hire-purchase agreement is made, not that he will have one when the property is to pass. The judgments, which were unreserved, raise difficulties. It is clear that a man can contract to sell goods which he will acquire after the contract is made. Why then can he not give an option on goods which he does not own at the time? And if he fails to transfer the property when called on to do so, the buyer has an adequate remedy in damages.

It is difficult also to see what different intention excludes section 12 of the Sale of Goods Act, 1893. Here as in every contract of hire-purchase there is no question of transferring property, nor therefore of a right to transfer, until the bailee-purchaser exercises his option to buy. Here the option was never exercised, and therefore no question as to the property in the goods or as to the bailor-vendor's right to pass a good title arose.

An option under this agreement could be exercised at any time after the agreement was made; but the legal position of this and of an agreement to sell is fundamentally different from that of sale which passes, or purports to pass, property immediately.

It would seem then that the intention of the parties is consistent with section 12; but as the option was never exercised and property was never to pass, section 12, sub-section 1, which would otherwise have governed the transaction, did not apply at all.

J. M. K.

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Conflict of Laws — Insurance (Marine) — Insurance Effected with English Underwriters through Brokers in New York—Failure of Assured to Pay Premiums at Due Dates—Law of New York Making Brokers Personally Liable to Underwriters for Payment of Premiums—Whether Brokers Entitled to Cancel Insurance in Order to Get Rid of their Personal Liability for Premiums which Assured has Failed to Pay.

*Ruby Steamship Corporation, Ltd.* v. *Commercial Union Assurance Co., Ltd.* (1933) 39 Commercial Cases, 48.

This was an appeal from a judgment of Roche J. in favour of the defendants. The action was brought by the Ruby Steamship Corporation,

a Nova Scotian company, against the Commercial Union Assurance Co., the English underwriters, to recover a total loss on the steamer *Hurona*. The policies were effected through J. and H., insurance brokers in the State of New York. It appeared that by the law of New York the brokers, in the event of default in payment of premiums by the assured, became personally liable to pay them, but that, in order to protect themselves, they were entitled to cancel the policies. Accordingly, the Ruby Corporation being in default, the American brokers had cancelled the policies.

On these facts it was held by the Court of Appeal, affirming Roche J., that, though the cancellation would not have been effective according to English law if the whole transaction had taken place in England, the contract between the appellants and the American brokers having been made in New York, it should be governed by the law of that State, and, therefore, the cancellation should be held binding against the Ruby Corporation.

Scrutton L.J., in delivering the judgment of the Court of Appeal (Romer and Greer L.JJ. concurring), rested his decision, in part, on the answer to the question: 'What law is applicable to the employment as between broker and employer?' In answering this question, he said (at p. 52): 'As to the relevant law, I follow and agree with the *dictum* of Lindley L.J., delivering the judgment of the Court of Appeal in *Maspons* v. *Mildred* [(1882) 9 Q. B. D. 530, 539], that in considering the nature and extent of the authority given by a Spanish principal to a Spanish agent in Spain (Cuba) the Spanish law is to be taken into account. This principle was stated by Professor Dicey in his book on the Conflict of Laws—I am reading from section 179 in the fifth edition, "An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created."'

The interest of this case lies in the fact that it is probably the first direct decision which supports Dicey's rule 179. Lindley L.J.'s *dictum* in *Maspons* v. *Mildred*, to which Scrutton L.J. refers, is quoted by Dicey as authority for the rule, but it is manifestly *obiter*. Indeed, in *Chatenay* v. *Brazilian Submarine Telegraph Co.* [1891] 1 Q. B. (C. A.) 79, which is also quoted by Dicey, where the plaintiff, a Brazilian subject, executed in Brazil a power of attorney to a broker resident in London to buy and sell shares, it was held that if the intention appeared to be that the authority should be acted on in England, the extent of the authority, so far as transactions in England were concerned, must be determined by English law.

It might, at first sight, seem as though the *Chatenay Case* conflicts with the *Ruby Case*, but that is not so, for they both illustrate and support the rule that 'The contract of agency, . . . is like other contracts, governed by its proper law, which is in general the law of the place where the contract is made' (Dicey, 5th ed. p. 724) but is frequently the law of the place of performance, the law to be applied in each case depending on the intention, express or presumed, of the parties (*ibid.* p. 672).

However, it should be noted that the *Ruby Case* was also decided on two further grounds, both involving pure questions of fact. Hence, the decision is not so strong as it might have been had the case depended wholly on the legal point.

F. A. V.

CONFLICT OF LAWS—SERVICE OF PROCESS OUT OF THE JURISDICTION IN ACTION ON CONTRACT MADE IN ENGLAND—EFFECT OF FOREIGN ARBITRAL AWARD.

*Bremer Oeltransport G.m.b.H.* v. *Drewry.* [1933] 1 K. B. 753.

IN accordance with the terms of a charterparty made in London, a dispute was submitted to arbitration in Hamburg, and an award was made against the defendant, D. On November 29, 1932, the plaintiffs, who were a German firm, obtained *ex parte* an order that they should be at liberty to issue a writ against D., who was residing in France, claiming the amount due under the award, and to serve notice of the writ on the defendant in France. The defendant applied to have that order set aside, but Goddard J. dismissed the application. On appeal, Goddard J.'s decision was affirmed.

It was held that in so far as the action was in reality on the agreement to submit to arbitration contained in the charterparty, rather than on the award itself, the writ might issue and notice of the writ be served out of the jurisdiction under Order XI, r. 1 (e) of the Rules of the Supreme Court, which provides for such service in cases where the action is upon a contract made in England. But the question was raised whether an action may be brought in England on the foreign arbitral award itself? The importance of the question becomes clear when the agreement to submit is invalid. Dicey (rule 121A) suggests that the award may found an action, and he quotes *Norske Atlas Insurance Co.* v. *London, etc. Insurance Co.* (1923) 43 T. L. R. 541 in support of the rule. In the comment on the rule it is said (5th ed. p. 491): 'While authority regarding the right to enforce by action in England a foreign arbitration award is scanty, it seems on principle that such an award duly pronounced in a foreign country, if it fulfils the conditions as to validity affecting foreign judgments, should be allowed to be enforced by an action.' (Cf. Westlake, Art. 331A; Foote, 5th ed. p. 637.) However, Slesser L.J. (with whom Romer L.J. agreed) in the *Bremer Case*, doubted the validity of this proposition. Commenting on the *Norske Case*, he said (at p. 760): 'Certainly in this [the *Norske*] case MacKinnon J. seems to treat the action as one upon the award as such and not as an action on the . . . contract, which he finds was invalid. The issue which I have here to consider was not directly argued before the learned judge, the point being, according to counsel, whether the contract of marine reinsurance was or was not invalid, and the authorities cited were none of them related to the problem whether the action was brought upon the award or upon the contract of submission. Nor does the learned judge, although his decision on the point is clear, cite any authority on that head.' After examining other authorities, Slesser L.J. concluded that an action might be brought upon an agreement to refer a dispute to arbitration, but he left it open whether an action could be founded on an implied contract in the award itself (p. 765).

Of course, so far as any particular case falls within the Arbitration (Foreign Awards) Act, 1930 (which here did not apply), the difficulty does not arise. But beyond this all that can be said is that, at present, the law on the point is uncertain, and it is open to the Court of Appeal to decide either for or against the independent efficacy of a foreign arbitral award.

F. A. V.

CONTRACT—ACCORD AND SATISFACTION—MUTUAL PROMISES WILL SUFFICE THOUGH BOTH ARE EXECUTORY.

*British Russian Gazette & Trade Outlook, Ltd.* v. *Associated Newspapers, Ltd.* [1933] 2 K. B. 616.

ALTHOUGH nominally an action for libel, this case gave rise to a variety of difficult and apparently unconnected legal points.

Mr. Talbot, the original owner of a newspaper, having formed a company, took in it a minority number of shares, transferring his paper to the company. The defendants published certain articles for which Talbot brought an action for libel and the company an action for slander of title. Through a representative the defendants procured from Talbot a document in which he said that he accepted 1,000 guineas in full discharge of the claim of himself and of the company against the defendants. However, the managing director and the plaintiff company refused to accept the proposed settlement so far as they were concerned, and the actions proceeded to trial; the defendants counterclaimed against Talbot for breach of warranty of authority.

The actions were tried before Avory J. and a special jury, and resulted in judgment for Talbot for £1,000 with costs, subject to judgment for the defendants on their counterclaim for damages to be assessed with costs, and judgment for the company for £100 and costs.

The defendants appealed against the verdict and judgment for the plaintiff company. The plaintiff, Talbot, appealed against the judgment for damages for breach of warranty of authority on the grounds that he had never represented that he had authority to settle the action for the plaintiff company, and secondly that, as the 1,000 guineas had not been paid, there had been accord without satisfaction, and accord by itself was devoid of legal consequences.

The Court of Appeal reversed the decision as regards the alleged libel on the company, holding that the words complained of were not capable of a defamatory meaning. As regards the plaintiff's appeal, the Court held that he was liable for damages for breach of warranty of authority. He had warranted he had authority to make both accord and satisfaction, so that, even if accord without satisfaction created no legal obligation, Talbot would still be liable for breach of warranty of authority. The Court further held that there had been accord and satisfaction. Scrutton L.J. said (at pp. 643—644): 'Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative. Formerly it was necessary that the consideration should be executed. "I release you from your obligation in consideration of £50 now paid by you to me." Later it was conceded that the consideration might be executory. "I release you from your obligation in consideration of your promise to pay me £50, and give me a letter of withdrawal." The consideration on each side might be an executory promise, the two mutual promises making an agreement enforceable in law, a contract.'

At p. 645: 'The argument for the plaintiffs on accord and satisfaction was directed to show that if Talbot had authority, the document would

have had no legal result. In my view there was an agreement to accept promise against promise. . . . The result in law was an enforceable agreement at any rate as in the present case by way of counterclaim.'

Before the decision in this case, there was some doubt whether, when there was accord executory and the debtor failed to carry out his promise, it could be said there was satisfaction at all (see Salmond & Winfield, *Law of Contracts*, 330; Anson, *Law of Contract* (17th ed.) 108).

The Court of Appeal have now held that the mere promise, even if not carried out, is sufficient.

W. W. Brown.

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Contract—Carriage of Goods by Air—Gold—Bullion Compartment — Alleged Negligence — Terms of Consignment Note — Common Carrier.

*Aslan* v. *Imperial Airways, Ltd.* (1933) 49 T. L. R. 415.

The plaintiff delivered to the defendants a quantity of gold for carriage from Baghdad to London. The journey was by air and rail, the stage between Tiberias and Brindisi being by seaplane.

Condition 9 in the consignment note provided that the goods were accepted for carriage only at the risk of the plaintiff and that the defendants undertook no responsibility for loss, damage or delay caused directly or indirectly during the conveyance by aeroplane or otherwise in connexion therewith. The clause continued: 'This refers to all obligations of the defendants either in respect of carriage, storage, or other operations in connexion with the goods,' and further stated that the defendants were not, and would not accept the obligations of, common carriers.

The goods not being delivered, the plaintiff brought an action for damages for their loss. On an order for trial of the preliminary issues the question for decision was whether the defendants, who admitted non-delivery, were relieved from liability by the terms of the contract of carriage, assuming that (a) the goods were lost by reason of the seaplane's lack of a compartment suitable for the carriage of bullion and reasonably fit to resist thieves, and/or (b) the goods were lost by reason of negligence on the part of the defendants.

Counsel for the plaintiff submitted two arguments: (1) There was an implied warranty that the aeroplane was either fit to carry bullion or as fit as care and skill could make it. This corresponded to the implied warranty of seaworthiness in the case of carriage by sea. Whether the obligation was absolute or qualified it had clearly been broken. Although a specially high rate was charged for bullion, the goods had been placed in an ordinary compartment offering no resistance to thieves. (2) The defendants were common carriers. Their advertisements showed as much. Condition 9 must be read on this assumption and along with the other clauses to show that its general words were meant to be limited in their effect. Further the defendants as common carriers were guilty of a breach of a duty, the non-delivery of the goods being evidence of negligence.

MacKinnon J., giving judgment in favour of the defendants, said that the case depended on the proper construction of the contract contained in the consignment note.

(1) There was no reason why a carrier by air should not be a common

carrier. In this case, however, the conditions of the consignment note, to which the sender had by his signature agreed, stated specifically that the defendants were not common carriers. Therefore the defendants were mere bailees and liable only for negligence.

(2) There was an implied undertaking that the defendants had exercised reasonable care and skill in making the aeroplane fit to fly and, so far as was consistent with the nature of an aeroplane, safe for the carriage of the plaintiff's goods. But there was no implied undertaking to provide a bullion room.

(3) Apart from the special clauses the defendants would be liable only for negligence. Now so far as ships were concerned there had been a stream of authorities which held that an exceptions clause in general words not mentioning negligence did not exclude liability for negligence. On the other hand authorities dealing with railways had taken a different view; and this was followed when the streams met in *Joseph Travers & Sons, Ltd.* v. *Cooper* [1915] 1 K. B. 73. He therefore held that although condition 9 did not mention negligence specifically it was sufficient to protect the defendants from liability on that ground.

This case defines what warranty of the safety of the goods may be implied in the case of carriage of goods by air. The other points raised were met by the terms of the particular contract, and are therefore of limited interest.

W. M. P.

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Contract—Consideration—Concession by Creditor to Debtor of Further Time for Payment of Debt and of Option to Pay it Through a Particular Bank, into Banking Account of Creditor's Solicitors—Nudum Pactum.

*Vanbergen* v. *St. Edmunds Properties, Ltd.* [1933] 2 K. B. 223.

The plaintiff owed the defendants £208 on account of costs on a judgment recovered by them. The defendants, by their solicitor, had several times demanded the money, and finally, as an act of grace, had given the plaintiff until July 7 to pay what was owing. On July 6 the plaintiff telephoned to K., a member of the firm of the defendants' solicitors, and asked him for further time to pay. K. replied he could have until midday on July 8. The plaintiff replied that he was going to Eastbourne on business, and that he could probably raise the money there, but that as he was uncertain when he would be returning to London, he might not be able to pay the money within the time allowed. K. suggested that he could pay the money into a bank at Eastbourne to be immediately transmitted to the credit of the solicitors with the Law Courts Branch of the Bank of England. This the plaintiff agreed to do and K. said that, if he received the money through the bank within the specified time, he would 'stay his hand,' *i.e.* he would refrain from serving on the plaintiff a bankruptcy notice which the solicitors had issued against him in respect of £140 8s. 5d. of the amount owing.

The plaintiff paid the money as agreed, and it was duly placed to the credit of the solicitors' account within the time allowed. The plaintiff notified them of the payment by post, but the letter failed to arrive and

the bankers did not notify the solicitors of the transaction. Thinking therefore that the plaintiff had not fulfilled his undertaking, they sent a clerk to the plaintiff's office and served him with the bankruptcy notice. The plaintiff sued for damages for breach of contract. Macnaghten J. held that, as the plaintiff was to pay the money in Eastbourne instead of London, and was to pay the solicitors instead of the defendants themselves, there was sufficient consideration for the agreement not to serve him with the bankruptcy notice.

The Court of Appeal reversed the decision on the ground that the agreement was *nudum pactum*. There was, said Lord Hanworth M.R. (at p. 232), no ' independent benefit [to the creditors], actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal,' as required by Lord Selborne in *Foakes* v. *Beer* (1884) 9 App. Cas. 605, 613. The creditors were to receive no more than was actually due and owing to them, and the fact that the money was to be paid at Eastbourne was for the benefit of the plaintiff and not of the defendants. In short, what the plaintiff alleged were benefits conferred by him on the defendants, or inconveniences imposed upon him by them; in reality he had had indulgences granted to him by the defendants, at his request, to enable him the more easily to discharge his debt, and avoid service of the bankruptcy notice.

This decision seems to add little to the law. It certainly does not modify the legal conception of consideration, and decides nothing more than that, where the terms of an existing, unilateral obligation are altered by agreement between the parties, the Court must inquire if the alteration is for the exclusive benefit of one of the parties, and, if so, and if the party benefiting is the party already bound, there will be no consideration for the new agreement. In short, consideration must move from the promisee and not towards him.

H. F. MacM.

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CONTRACT—DAMAGES—DIFFERENCE BETWEEN LOSS OF REPUTATION AND LOSS OF PUBLICITY—OPTION OF PLACE OF PERFORMANCE.

*Withers* v. *General Theatre Corporation, Ltd.* [1933] 2 K. B. 536.

THE plaintiff, a variety artiste, contracted with the defendants to appear for three weeks at the London Palladium. On the margin of the printed contract Withers initialed a clause that he would perform at any other of the defendants' theatres at their option. Before performance was due the Palladium authorities decided that his sketch would not be in a fit state in time for the date of production. Withers protested. They gave him written notice that he could not perform at the Palladium. He brought an action for breach of contract, claiming damages for loss, including loss of publicity and reputation as a variety performer through defendants' breach of contract. The summing-up did not allude to defendants' option as to theatres. Defendants appealed against the finding of £1,000 for loss of publicity. They did not contest the loss of profit, £675, his net salary. The Court of Appeal ordered a new trial.

Scrutton L.J. (p. 547) said: ' Damage to a reputation already existing by not allowing an appearance is not a matter which can be considered,

but what has to be considered is whether, if the actor had been allowed to appear, that appearance would have given him publicity and whether he has been deprived of that opportunity of appearing.' Greer and Romer L.JJ. agreed, and a new trial was ordered on the question of damages, as the jury had not been told that they must not consider loss of reputation already acquired.

In *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ltd.* [1928] 1 K. B. 269 the Court of Appeal gave damages for loss of publicity. Bankes and Atkin L.JJ. said the jury were entitled in assessing damages to consider loss by failing to attain the hoped-for reputation and also damage to existing reputation (pp. 281 and 288). Damages for loss of publicity were approved in *Clayton and Waller* v. *Oliver* [1930] A. C. 209. But in a considered judgment Lord Buckmaster said that in assessing damages the jury may consider (1) loss suffered because the theatre was important, and (2) that ordinarily he would have been advertised there. 'The learned judge,' said Lord Buckmaster, 'put the matter as a loss of reputation, which I do not think is the exact expression, but he explained it as the equivalent of loss of publicity and that summarizes . . . the true situation.' Lord Dunedin added that this was merely applying the rule in *Hadley* v. *Baxendale* (1854) 9 Ex. 341.

In ordinary employment contracts the employee loses nothing by not being given work, but an actor loses publicity, so his contract is divisible and there are damages for loss of salary and for loss of publicity, but not for acquired reputation being diminished. As Scrutton L.J. says, in actions for wrongful dismissal and not allowing performance of a service damages are given only for the pecuniary loss, not as compensation for manner of dismissal, injured feelings, or possible loss from the fact that a dismissed man may find it harder to get future employment. This follows *Addis* v. *Gramophone Co.* [1909] A. C. 488.

On the construction of the contract Scrutton and Romer L.JJ. held that defendants had a choice as to whether the plaintiff appeared at the Palladium or another theatre. Where the defendants had an option in the method of performance it must be assumed that they would perform in the way most beneficial not to the plaintiff but to themselves. The judge had not told the jury of the option or of this assumption, and damages seemed to have been awarded as for the Palladium, not as for the defendants' worst theatre. New trial on this also for damages. This follows *Cockburn* v. *Alexander* (1848) 6 C. B. 791, 814 and *Robinson* v. *Robinson* (1851) 1 D. M. & G. 247, 257.

P. D. M.

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CONTRACT — INSURANCE — SOLICITOR'S INDEMNITY POLICY — INSURANCE AGAINST LOSS ARISING FROM NEGLECT, OMISSION OR ERROR WHEN ACTING AS A SOLICITOR—LOSS BY REASON OF INADVERTENTLY MAKING A CHAMPERTOUS AGREEMENT—HELD NOT TO BE COVERED BY TERMS OF INSURANCE AS BEING CONTRARY TO PUBLIC POLICY.

*Haseldine* v. *Hosken.* [1933] 1 K. B. 822.

THE plaintiff, a solicitor, sued the defendant, a Lloyd's underwriter, on a Solicitor's Indemnity Policy, insuring him against loss arising from neglect, omission or error while acting as a solicitor.

The facts leading to the action were as follows: Broad was the agent for Sterns, Ltd. in Japan and in 1928 was making a claim for commission against Sterns. He gave Aveyard a power of attorney authorising him to take steps to recover the money on the condition that Aveyard was to be liable for all costs of the action but was to receive 50 per cent. of any amount recovered from Sterns. Aveyard employed Haseldine as solicitor in the action and Haseldine agreed to be liable for all costs but was to receive 20 per cent. (altered later to 40 per cent.) of any amount recovered from Sterns.

In the action for the commission judgment was entered for Sterns with costs. An appeal was dismissed. Sterns could not recover their costs from Broad and, on learning of the agreement between Haseldine and Broad, sued the former for damages for champerty and/or maintenance. This was settled by Haseldine for £950. He then sued Hosken on the policy.

The case was tried before Swift J., who gave judgment for the plaintiff, on the ground that it was quite legal for a solicitor to protect himself by insurance against slips made while acting professionally. He was convinced that Haseldine did not know that the agreement was illegal under section 11 of the Solicitors Act, 1870. It was against errors of this kind that he had indemnified himself and so he was entitled to recover. The defendants appealed.

Scrutton L.J. in allowing the appeal said that Haseldine was clearly guilty of champerty. This could be inferred not only from the definition of champerty, but also from the fact that he had settled Sterns' action against him for champerty. Further, section 11 of the Solicitors Act, 1870, said that the Act did not give validity to the purchase by a solicitor of the whole or part of his client's interest, nor to an agreement that stipulates for payment only in the event of success. In his opinion also a champertous agreement was neither neglect, omission nor error under the policy. Even if it was, it was contrary to public policy; but the better view was that the commission of a criminal act was not within the words 'neglect, omission or error.' He also referred to KennedyJ. in *Burrows* v. *Rhodes* [1899] 1 Q. B. 816, 829, who said that the doer of an act which was criminal could not claim indemnity when he knew all the circumstances necessary to make it an offence but did not know that it was so. A man is presumed to know the law.

Greer L.J. agreed, adding that he thought the policy only applied to acts done on behalf of a client and not to those done for his own benefit, as were the acts in question. Accordingly they were not covered by the policy.

Slesser L.J. also agreed and referred to *Scott* v. *Brown, Doering, McNab & Co.* [1892] 2 Q. B. 724, 734, where A. L. Smith L.J. said that if a plaintiff could not prove his case without showing that he had been guilty of illegality the Court should not assist him.

W. H. B.

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CONTRACT—PRIVATE INQUIRY AGENCY FOR CONFIDENTIAL INFORMATION ON TRADERS' SOLVENCY — INDEMNITY CLAUSE AGAINST DISCLOSURE OF INFORMATION HELD NOT CONTRARY TO PUBLIC POLICY—MEASURE OF DAMAGES.

*Bradstreets British, Ltd.* v. *Harold Mitchell and Carapanayoti & Co., Ltd.* [1933] 1 Ch. 190.

THE plaintiff company was a mercantile inquiry agency, which furnished reports on the financial stability of persons and bodies engaged in trade. These reports were provided only to approved persons, accepted by the plaintiffs as subscribers. In applying for a report, subscribers were required to sign a standard application form accepting certain conditions, amongst which were conditions that the reports were strictly confidential and that subscribers should indemnify the plaintiffs against any loss sustained by them directly or indirectly through disclosure of the reports in breach of the contract. The defendant company, which was the English agent of X & Co. and an approved subscriber to the plaintiff company, was provided, on application, with a report on the financial stability of X & Co., which contained libellous statements. This report was communicated to the defendant company's solicitors, but no action was taken.

The defendant Mitchell, a director of the defendant company, then became a subscriber to the plaintiff company and obtained from them a report on X & Co. similar to that sent to the defendant company. This report he took to Carapanayoti, his fellow-director, who showed it to the company's solicitors. This was admittedly a device to free the defendant company from liability to the plaintiff under the indemnity clause, Mitchell, as a man of straw, being prepared to bear the responsibility. The defendant company then broke off relations with X & Co., who subsequently heard of the reports issued by the plaintiffs and successfully brought an action for libel against the plaintiff company. That company now claimed (1) an injunction restraining the defendants from publishing either of the reports in question, (2) a declaration that the defendants were liable to indemnify them against any loss suffered by them through disclosure of the reports by the defendants, (3) damages for breach of contract. Luxmoore J. first gave judgment for the defendant company, holding that their disclosure of the first report to their solicitors did not amount to a breach of contract.

On behalf of the defendant Mitchell it was argued that the condition that a subscriber should indemnify the plaintiffs against any loss incurred through disclosure of a report was void as being contrary to public policy. The learned judge, however, distinguished the case of *W. H. Smith & Sons* v. *Clinton* (1908) 99 L. T. 840, where the condition held to be void was expressly for indemnity against an illegal act, and followed *Weld-Blundell* v. *Stephens* [1919] 1 K. B. 520; [1920] A. C. 956, 997. In that case it was held that an express or implied condition that a confidential agent should not divulge the contents of his letter of instruction was not contrary to public policy. The present contract was therefore valid and the defendant Mitchell was liable for breach of it.

On the question of damages, the learned judge again followed *Weld-Blundell* v. *Stephens*, where it was held by a majority in the Court of Appeal and the House of Lords that damages awarded against a principal for a libel contained in a letter of instruction were not due to the agent's

negligence in allowing the contents of the letter to become known, but to the principal's own act in publishing the libel. The cause of action arose immediately the principal published the defamatory matter, and the effect of the agent's negligence was merely to make the defamed persons aware that this cause of action existed. The learned judge accordingly held that the plaintiffs' liability to X & Co. did not arise directly or indirectly from the breach of contract by Mitchell, so that damages could only be nominal. Judgment was therefore given for forty shillings damages against Mitchell, with leave to apply as to an injunction.

E. W. S.

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CONTRACT—RESTRAINT OF TRADE—STIPULATION FOR FORFEITURE OF PENSION, IF DEFENDANT ENTERED A PARTICULAR TRADE, HELD BAD—GRATUITOUS PROMISE.

*Wyatt* v. *Kreglinger & Fernau.* [1933] 1 K. B. 793.

THE plaintiff had been in the employment of the defendants and their predecessors for many years and, on his retirement in 1923, the defendants wrote to him as follows: '. . . Upon your retirement we have decided to grant you a pension of £200 per annum: . . . you are at liberty to enter any other business except the wool trade, and the only other stipulation we attach to the continuance of this pension is that you do nothing at any time to our detriment (fair business competition excepted).' The plaintiff's reply was lost, but he must have said he was entitled to three months' notice, as the defendants replied agreeing to this and referring to the pension as 'remuneration.' The plaintiff's reply to this was also lost. In June, 1932, the defendants discontinued payment of the allowance.

The plaintiff claimed damages for breach of contract and a declaration that the defendants were liable to pay £200 per annum in future on the same terms and conditions.

The defence was (a) that the promise to pay a pension was gratuitous and not under seal, and (b) that even if the plaintiff had given valuable consideration, the agreement was void, being in restraint of trade.

In the first instance Macnaghten J. held that the promise was in fact gratuitous, and therefore did not find it necessary to decide the second point. On appeal Scrutton L.J. agreed with Macnaghten J., but he also agreed with Greer and Slesser L.JJ. (who held that there was valuable consideration) that a stipulation not to enter a certain trade on pain of forfeiting a pension was obligatory, and being general in character was equivalent to a negative covenant. The contract was therefore held to be void in restraint of trade, despite the fact that there was no actual negative covenant in the agreement.

It may be remarked in conclusion that nearly always it is the covenantor who seeks to prove that an agreement is void in restraint of trade. In this case it was the covenantee who pleaded the restraint of trade, and it seems rather unjust that the party who has imposed the burden of the covenant (or stipulation) should be allowed to repudiate the agreement on the ground that the covenant is in restraint of trade; but there can be no doubt as to the correctness of the decision on this point. Apart

from voidness for restraint of trade, Greer and Slesser L.JJ. inclined to regard the letter as creating a binding contract, but refused to decide this point in the absence of further argument. Scrutton L.J. held that the letter merely showed a gratuitous promise. The limit put upon the plaintiff as to entering the wool trade was merely an intimation of desire that he should not enter it, and that, if he did, he must not expect continued payment of the £200 (pp. 805—806). Apparently, also, Scrutton L.J. held that the parties never intended to create legal relations. It must be confessed that neither conclusion appears to be convincing.

A. F. S.

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CRIMINAL LAW — WOMAN CAN BE CONVICTED OF INDECENT ASSAULT ON MALE.

*R.* v. *Hare.* (1933) 24 Cr. App. R. 108; [1934] 1 K. B. 354.

THIS case partly removes another distinction between the sexes; but one which we have not heard the gentler sex treat as a grievance.

Apart from the ruling in *R.* v. *Jellyman* (1838) 8 C. & P. 604, that if a married woman consented to her husband committing an unnatural offence with her she would be an accomplice to the felony, and, as such, her evidence would require corroboration, it was not suggested until *R.* v. *Hare* that a woman could be convicted of a sexual crime. It has not infrequently been the subject of judicial comment in cases of carnally knowing girls under eighteen that it was the man who was really seduced. The following paragraph, taken from the *Times* newspaper for February 22, 1934, is typical. 'Referring to the Calendar, which contained the names of nine people charged with offences against four girls, the Judge said that the evidence, whatever might be the guilt of the nine persons, made it perfectly apparent that the four children, because that was what they were, under 16 years of age, were just common prostitutes and acting as such. By their own confession they were anxious that men should behave indecently with them in order that they might earn money.' So far it has always been the man who took the blame; although the Court's observation is often reflected in the sentence; but here the judge went on to recommend to the police that such girls should be taken under the Children Act, 1933.

In *R.* v. *Hare* the appellant had, on three occasions, instigated and induced a boy of the age of twelve years to have connexion with her. Being accused by the boy's father, she admitted the fact. She was indicted under the Offences against the Person Act, 1861, s. 62: 'Whosoever shall attempt to commit the said abominable crime, [sodomy] or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to . . . [punishment stated].'

The boy, being under sixteen years, was by law incompetent to consent to the acts. The accused was convicted of indecent assault, and she appealed. The appeal was brought on the ground that section 62 of the Offences against the Person Act, 1861, referred only to offences of a sodomitical character. The Court of Criminal Appeal consisted of Hewart L.C.J., Avory and Lawrence JJ. Two points were raised.

(1) The heading of sections 61—63 of the Act of 1861 is ' Unnatural Offences.' Held, the heading of a group of sections forms no part of the statute. It, and marginal notes, are not voted on by Parliament, but are inserted after the bill has become law; therefore the heading cannot control the plain meaning of the enacting part of the statute; it can only be treated as a preamble to throw light on any ambiguity. In sections 61—63 there is no ambiguity.

(2) According to section 62, ' Whosoever . . . shall be guilty . . . of any indecent assault upon any male person . . . shall be liable . . . to be imprisoned for any term not exceeding two years, with or without hard labour.' So, too, section 61 begins with ' whosoever,' and the defence argued that as section 61 referred exclusively, and section 62 principally, to unnatural offences, therefore an indecent assault upon a male person under section 62 must mean an act of sexual perversion. It was also argued that ' whosoever ' in relation to indecent assault did not include a female; and that this was borne out by the difference in punishment between indecent assaults on females under section 52, and on males under section 62. In this case there was no attempt at sexual perversion; therefore no indecent assault.

Held, by the Recorder of London, and confirmed by the Court of Criminal Appeal, that ' whosoever ' in section 62 meant male or female, and that a woman could be guilty under section 62 of an indecent assault upon a male; or, under section 52, upon another female.

Appeal dismissed.

H. B.

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Criminal Law — Misdemeanour of Causing or Intending to Cause Public Mischief—False Story of Robbery by Person of Given Description—Time of Police Wasted—Persons of Same Description Exposed to Suspicion.

*R.* v. *Manley.* [1933] 1 K. B. 529.

M. was indicted for having, by means of false statements that on two occasions she had been robbed by men whose descriptions she gave, caused officers of the Metropolitan Police to devote their time and services to the investigation of false allegations, thereby temporarily depriving the public of the services of these public officers, and rendering subjects of the King liable to suspicion, accusation and arrest. The indictment alleged that in so doing she did unlawfully ' effect a public mischief.' The Recorder of London held that this indictment disclosed a common law misdemeanour, and she was convicted. She appealed to the Court of Criminal Appeal, which dismissed the appeal.

The Court, in a judgment delivered by Lord Hewart C.J., held that the acts done by M. constituted a public mischief, and that there is a misdemeanour of committing an act tending to the public mischief. The judgment was based on the *dictum* of Lawrence J. in *R.* v. *Higgins* (1801) 2 East 5, 21: ' All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable.'

It is not often that we witness the birth of a new common law offence.

In *R.* v. *Higgins*, the *dictum* of Lawrence J. was *obiter*; all that the case decided was that incitement to commit a crime is a misdemeanour. 'That case,' said Lord Hewart, 'was referred to with approval in the case of *R.* v. *Brailsford* [1905] 2 K. B. 730, and in the still more recent case of *R.* v. *Porter* [1910] 1 K. B. 369, in which Lord Alverstone C.J. in delivering the judgment of the Court said: "We are of opinion that it is for the Court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact, upon which evidence can be given."' But *R.* v. *Brailsford*, in which Mr. H. N. Brailsford, the journalist, and another were indicted for conspiracy to obtain a passport in the name of one of them for the use of another person, and *R.* v. *Porter*, a case of conspiring to indemnify bail, are both cases of conspiracy. An act which it is an unlawful conspiracy to agree to do is not necessarily an offence itself. It is no offence to 'hoot, hiss, groan and yell' during a theatrical performance, though an agreement to do so may be a conspiracy (*Gregory* v. *Duke of Brunswick* (1843) 6 M. & G. 205).

Yet, in *R.* v. *Brailsford*, Lord Alverstone C.J. said in the course of argument: 'It must not be assumed that obtaining a passport by false declarations is not an offence apart from combination' ([1905] 2 K. B. at p. 737). This statement was clearly *obiter*, since in *R.* v. *Brailsford* there *was* combination. The cases cited appear to be the only authority for the judgment in *R.* v. *Manley*, where there is no trace of conspiracy whatsoever. In a case very similar to *R.* v. *Manley* at Derby Assizes (*Times* newspaper, November 17, 1932), Humphreys J. charged the Grand Jury to throw out the bill, as no such offence as public mischief was known to the law, and added that it was not desirable to multiply criminal offences.

How far is it desirable for the judges to declare new common law offences? Stephen (*History of Criminal Law*, vol. iii, pp. 359-60) pointed out that, whatever necessity for this there may have been in our early criminal law owing to its scanty nature and the infrequency with which Parliament sat, neither of these reasons now exists; and Dr. Stallybrass in 49 L. Q. R. (1933) 183—191 cites this with approval.

It seems that a new common law offence has been declared by the judges, an offence which, harmless and useful while restricted to the mischievous wasting of the time of public servants, is capable of being extended to include anything which occasions the opprobrium of the Bench. The judgment delivered by Lord Hewart in *R.* v. *Manley* has in it the seed of a New Judicial Despotism.

A. W. G. K.

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Real Property—Restrictive Covenants—Express Assignee of Benefit —Conditions Subject to which he may be Entitled to Sue.

*Re Union of London & Smith's Bank, Ltd.'s Conveyance; Miles* v. *Easter.* [1933] 1 Ch. 611.

In this case the facts were extremely complex and may be thus simplified:

A, tenant in fee simple of Blackacre and Whiteacre, sold Blackacre

to B. There was no building scheme on the sale, but a restrictive covenant was taken from B. The benefit was not annexed to Whiteacre so as to run with it. Later A sold parts of Whiteacre, retaining a part himself; X bought two parts; A then purported to give to X the benefit of the covenant by two separate express assignments, one for each part. They were not made at the same time and, in the interval between the two, A sold the rest of Whiteacre. B sold Blackacre to Y, who took with notice of the covenant. It was not disputed that the burden of the covenant ran with Blackacre.

The questions arising were: (i) was either of the assignments effective? and, consequently, (ii) could X enforce the covenant against Y in respect of either of the parts of Whiteacre which he held?

Bennett J. gave judgment for Y, holding that X could not enforce the covenant. The benefit of the covenant had not been annexed to every part of Whiteacre, or indeed to any part of it. Therefore the benefit could not run with the land. In the express assignments there had been also no identification of the land to be benefited.

The Court of Appeal affirmed this decision, stating the law as follows. If a restrictive covenant is taken for the benefit of land retained by a vendor at the time of sale, and there is evidence in the conveyance of the benefit of the covenant being annexed to the land retained, that is, that it should enure for the benefit of each and every part of the land retained, then the benefit of the covenant will run with the land. In all other cases the vendor's assigns will be able to sue only if the covenant is expressly assigned to them (*Renals* v. *Cowlishaw* (1878) 9 Ch. D. 125). The theory of restrictive covenants seems to be, that it is made possible for the covenantee thereby to get a better price for the land retained. The ' dominant ' land must therefore be ascertainable and definite, capable of being benefited, and after the covenantee has parted with his whole interest he can no longer enforce the covenant.

The Court approved *Chambers* v. *Randall* [1923] 1 Ch. 149. Where the covenant is made for the purpose of obtaining a better price for the land, its use is spent when the covenantee's whole interest is gone.

Their Lordships considered that it was possible that, in *Ives* v. *Brown* [1919] 2 Ch. 314, the legal estate was still vested in the executors; but there was no evidence that the learned judge in that case had considered the question of whether they had the necessary land to be benefited, so as to sue.

In *Lord Northbourne* v. *Johnston & Son* [1922] 2 Ch. 309 the covenantees must be held to have kept the benefit on trust for the plaintiff, and it was not therefore lost when the covenantees alienated all the land. In neither of these cases did the learned judge intend to hold that a covenantee may sue upon a covenant after parting with his whole interest.

On the facts of the present case the Court held that there was no annexation of the benefit to the land retained for it to run therewith, nor was there sufficient identification of the land to be benefited for it to pass by express assignment. As to the second assignment, A had already sold all his land.

W. A. D.

SALE OF GOODS—IMPLIED WARRANTIES UNDER SALE OF GOODS ACT, s. 14 —EXPRESS WARRANTY OF 'COMPLETE SATISFACTION.'

*Cammell, Laird & Co.* v. *Manganese Bronze and Brass Co.* [1933] 2 K. B. 141.

CAMMELL, Laird & Co. ordered from the Manganese Bronze and Brass Co. two propellers for the *Athelfoam* and her sister ship, to be made according to specifications and plans supplied and to be to 'the entire satisfaction' of the shipbuilders and the owners' representative. The ships were fitted with Diesel engines with differing 'critical periods'; details of these were not, however, given to the propeller makers. When the propeller of the *Athelfoam* was supplied it caused excessive noise and vibration at the 'critical periods' of the engines (although these did not occur when tested with the propeller of its sister ship). It was only satisfactorily fitted after two replace propellers had been made and after long and expensive trials. The shipbuilders claimed damages for the delay and the trials, stating that the defendants had warranted (1) expressly that the propellers should be to 'the entire satisfaction' of themselves and the owners' representative, (2) by implied warranty under Sale of Goods Act, s. 14, sub-s. 1, that the propellers should be fit for the particular purpose for which they were required, (3) by implied warranty under section 14, sub-section 2, that the propellers should be of merchantable quality. The defendants counterclaimed for the cost of the replace propellers. Roche J. gave judgment in their favour. The shipbuilders appealed.

On the point of the express warranty the majority judges in the Court of Appeal agreed that, where 'entire satisfaction' with the goods was a condition precedent of the contract or where it was a question of personal taste, such a clause might well give a wide discretion to reject. But here the purchasers could not reasonably be dissatisfied that the goods did not correspond with their plans; the cause of dissatisfaction was not any defect in the propeller, but in the noise which it made in combination with the engine, and for that combination the defendants were not responsible. As for merchantability, the propellers were sound and of good workmanship; they were merchantable, although not suited to these particular engines.

Had then the appellants made known the particular purpose for which they required the goods so as to show reliance upon the skill and good judgment of the vendor? In drawing up the plans the engine-makers had been consulted, but this was not final, since exclusive reliance need not be shown. But in fact, although the vendors knew of the general purpose of the goods, they did not know of the particular purpose, *viz.* the fitting of the propellers to engines with particular 'critical periods.' Consequently where dimensions were not given them they followed normal practice. This was a case according to *Benjamin on Sale* (7th ed. pp. 662—663) quoted by Scrutton and Lawrence L.JJ., in which the purchaser supplies the vendor with a plan and 'relies upon his own judgment as to the sufficiency of the plan . . . for effecting the purpose contemplated.' It remains for the vendor to follow the plan with reasonable accuracy and to choose the materials with reasonable skill. This the respondent company had done, and the appeal therefore failed (Scrutton and Lawrence L.JJ.; Greer L.J. dissenting).

Where a little girl orders ' two nice fresh crabs for tea ' the question of reliance is a simple one. But where a great shipbuilding firm orders a propeller from a leading firm of engineers the question is a nice one indeed. Particularly in the facts of the present case, where the whole matter was one ' on which the views of experts were rather empirical ' (Scrutton L.J.). Indeed, only after the case had been in progress for several days did the shipbuilders propound a satisfactory theory to explain the misbehaviour of the offending propeller.

M. A.

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SALE OF GOODS—SALE BY DESCRIPTION OF TIMBER, THICKNESS WHEREOF WAS EXACTLY SPECIFIED—SUBSTANTIAL COMPLIANCE WITH SPECIFICATION HELD NOT SUFFICIENT—BUYER ENTITLED TO REJECT—SALE OF GOODS ACT, 1893, s. 13.

*Arcos, Ltd.* v. *Ronaasen & Son.* [1933] A. C. 470.

THE appellants contracted to supply and deliver to the respondents a large quantity of staves for the manufacture of cement barrels. Although the contract provided for variations in the length and breadth of the staves, the thickness of all of them was to be a uniform half inch. On the arrival of the goods the buyers claimed that they did not comply with the description, and under section 13 of the Sale of Goods Act, 1893, they could reject the goods. The dispute was referred to arbitration in accordance with the provisions of the contract, and in his award in favour of the vendors (the appellants in the proceedings before the House of Lords) the umpire found that only 5 per cent. of the staves were $\frac{1}{2}$-inch thick, that nearly all the rest were of varying degrees of thickness up to $\frac{5}{8}$-inch, and that a few were as much as $\frac{3}{4}$-inch thick. He stated: ' I am satisfied that the staves when shipped were commercially within and merchantable under the contract specification.' . . . ' I find that staves of thickness not exceeding $\frac{5}{8}$-inch are fit for the purpose of making cement barrels whether as sides or headings.' He thereupon gave an award for the vendors subject to a case stated to the High Court.

Wright J. reversed the decision of the umpire and held that the buyers were entitled to reject the goods. He was affirmed in his decision by the Court of Appeal and the House of Lords for the following reasons. The answer to the question, ' Did the goods answer the description? ', was obviously ' no.' As Lord Buckmaster pointed out, the mere fact that the word ' commercially ' had been used by the umpire showed that, in his opinion, the vendors were offering the buyer only substantial compliance with the description of goods in the contract, and that was not sufficient (p. 474).

The appellants based their case on a *dictum* of Bigham J. in *Vigers Bros.* v. *Sanderson* [1901] 1 K. B. 608, where it was said that the right of rejection which a buyer had would not operate ' so as to force the buyer to take the goods which are neither within nor about the specification not commercially within its meaning.' It was pointed out by the House of Lords that this *dictum* had no application to the present case because, whereas in the case of *Vigers Bros.* v. *Sanderson* the contract stipulated

that the goods were to be 'about' a certain specification, there was no such measure of variation provided for in the present case. In fact Wright J. expressly ruled that the umpire had had no evidence to find—as he had done—that 'some excess in thickness was permissible.'

The effect of the case may be summed up in the following words of Lord Buckmaster: 'If the article they (the buyers) have purchased is not in fact the article that has been delivered, they are entitled to reject it even though it is the commercial equivalent of that which they have bought' (p. 474).

D. W. M.

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Settled Land—Tenant for Life—Building Lease for 999 Years under Settled Land Act, 1925, s. 41—Covenant by Lessee to Rebuild, no Definite Time being Specified for this—Covenant Held Valid—Settled Land Act, 1925, ss. 41, 42, 44, 117.

*Re Grosvenor Settled Estates; Duke of Westminster* v. *McKenna.* [1933] 1 Ch. 97.

A tenant for life under a settlement wished to grant a lease, which was valid and effective according to the terms of the settlement, to a tenant for 999 years, in consideration of the surrender of an existing lease and the payment of a premium. The question at issue was whether it was a building lease within the meaning of the Settled Land Act, 1925, s. 41, as it contained the following proposed covenant: 'and the tenant will, as and when reasonably necessary, and particularly when required by the estate surveyor so to do, rebuild, in a proper and workmanlike manner . . . the whole, or such part of the demised buildings as may require to be rebuilt and so that in the event of a total rebuilding being necessary, the new building shall be in every way appropriate to the circumstances existing at the time of such rebuilding.' On this ground it was contended by the defendants that, as no definite time limit was stipulated for within which the building was to be done, it might well be not a building lease but an occupation lease. The plaintiffs argued that, unlike the similar powers given to mortgagors and mortgagees in possession by section 99 of the Law of Property Act, 1925, where a definite time limit of five years was stipulated for, the powers given under section 41 of the Settled Land Act did not have to be exercised within any such restricted period.

Eve J. in giving judgment said that, although by section 44, sub-section 2 of the Settled Land Act a peppercorn or nominal rent could be charged for the first five years of a building lease, he saw no reason why it should be construed so as to import the same words into section 41, which merely states the extreme periods for which leases may be granted. He held that this view was supported by the parallel case of mortgagors and mortgagees in possession under the Conveyancing Act, 1881, and the powers given to life tenants under the Settled Land Act, 1882, where a similar distinction as regards time limit appeared.

In the Act of 1881, where a building lease was entered upon, the building operations had to be completed within five years, while no time limit was stated in the latter Act. He held that this same distinction was

maintained when their respective terms were enlarged in the legislation of 1925. He therefore held that the Legislature did not intend to impose on the tenant for life an obligation to covenant that building operations in a building lease should be completed within any specified time.

The case was in the nature of a test action to ascertain the lawfulness of the proposed covenant in order to avoid future litigation.

G. A. C.

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TORT — INJURIOUS FALSEHOOD DISTINGUISHED FROM DEFAMATION — IMPROPER MOTIVE ESSENTIAL TO CAUSE OF ACTION—AMBIGUITY OF THE TERM MALICE.

*Balden* v. *Shorter.* [1933] 1 Ch. 427.

PLAINTIFF had been employed as salesman to a company and had obtained numerous orders. After its liquidation he continued in the service of the receiver for two months before obtaining like employment elsewhere. Defendants bought the goodwill of the company's business and the right to use the same trade name. They took over also the services of a Mr. Bensted, who had been employed both by the original firm and by the receiver. A customer who had long dealt with the plaintiff gave an order to Mr. Bensted who, in answer to the customer's inquiry, said that the plaintiff was employed by the defendants and would receive commission on the order. The plaintiff, who was not in the employ of the defendants, alleged that Mr. Bensted's statement was made with intent to induce the customer to give the order; and sought an injunction to restrain the defendants and their agents from representing that he was employed by them.

It appeared in evidence that Mr. Bensted's statement was made in the honest, though careless, belief that it was true. Maugham J. refused to grant an injunction. The cause of action was not Defamation, but Injurious Falsehood. Defamation is an attack upon the reputation: Injurious Falsehood is not. Injurious Falsehood is a false statement made with respect to any person which induces other persons to act in a manner which causes loss to him. Examples are slander of title and the misleading use of trade names. In cases of Defamation ' malice ' in its strict and proper sense of ' dishonest motive ' need not normally be shown: in cases of Injurious Falsehood it must. Plaintiff had failed to show malice in this sense. Mr. Bensted's statement was at the most nothing more than negligent.

The only difficulty in this case was due to the ambiguity of the term ' malice.' In *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1900) 18 R. P. C. at p. 99 Lord Davey said that in order to maintain an action for slander of title it was necessary to prove that the statements complained of were made ' maliciously,' and he defined ' maliciously ' as ' without just cause or excuse.' This definition is criticized by Salmond, *Torts*, pp. 582 *et seq.* If ' malice ' means no more than this, it is equally necessary to prove malice in any action for slander or libel. Cp. the *dictum* of Bayley J. in *Bromage* v. *Prosser* (1825) 4 B. & C. at p. 255, where ' malice ' is taken in this sense, and see Pollock, *Torts* (13th ed. at p. 253).

In *Greer's, Ltd.* v. *Pearman and Corder, Ltd.* (1922) 39 R. P. C. at

pp. 406 *et seq.* Bankes and Scrutton L.JJ. repudiated Lord Davey's view of the foundation of liability in this action—' Maliciously, not in the sense of illegally, but in the sense of being made with some indirect or dishonest motive.' In *British Ry. Traffic and Electric Co.* v. *C. R. C. Co.* [1922] 2 K. B. 260, 267 McCardie J. reviewed the authorities and reached the same conclusion.

It is suggested that we should do well to drop entirely the use of the term ' malice ' as meaning ' intentionally and without just cause or excuse,' and to confine it to its natural meaning of ' with an indirect or dishonest motive.' The essential distinction between intention and motive is well explained by Sir F. Pollock, *First Book of Jurisprudence*, pp. 147—155.

S. B. R. C.

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Tort—Negligence and Nuisance Distinguished—Occupier of Building Held Liable for Negligence for Fall of Guttering Injuring Occupants of the Building to whom Occupiers were under no Contractual Duty.

*Cunard* v. *Antifyre, Ltd.* [1933] 1 K. B. 551.

Appeal from the Westminster County Court. C. occupied rooms on the third floor of a building, where he lived with his wife under a monthly tenancy from one M., who was lessee of the upper portion of the house from the defendants. Actually M. had no right to make the sub-lease without the consent of the defendants, and M. had obtained no such consent. M. had covenanted with defendants to keep the premises in good repair internally and externally, drains, roof and damage by fire excepted. The effect of this and other leases was to vest the main roof and guttering in the defendants as occupiers. C.'s kitchen, which was covered by a glass roof, jutted out beyond the back wall of the house, and through this glass roof a heavy piece of guttering fell from the main roof of the building, causing injury to Mrs. C. and damage to C.'s property.

The county court judge gave judgment for the defendants. The Divisional Court reversed this decision. The judgment was delivered by Talbot J., who pointed out that the substance of the case depended upon whether the defendants were under a duty to either of the plaintiffs to take care, in spite of the fact that there was no contractual relation between them.

The rottenness of the guttering was not a nuisance because the plaintiff had no legal title owing to the fact that his lessor had no right to sub-let. But since the plaintiff was lawfully in occupation of the kitchen an action lay for negligence on the ground that there was a breach of the duty owed by the defendants to the plaintiff. The nature of this duty had been set out in the judgment given by Lord Atkin in *M'Alister (or Donoghue)* v. *Stevenson* [1932] A. C. 562 at p. 580: ' You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which

are called in question.' In the present case it seemed obvious that the defendants, having control over the guttering, could scarcely have failed to realize that it might, if not properly secured, fall and injure somebody in the kitchen below. This being so, there was a definite duty arising between the defendants and the plaintiffs.

The defendants relied upon the case of *Malone* v. *Laskey* [1907] 2 K. B. 141. There the plaintiff's husband was in occupation of defendants' house without any privity of contract between him and defendants. The vibration caused by the defendants' engine on their adjoining premises displaced a tank in the lavatory of the plaintiff's house, which fell on her and injured her. Held, defendants were not liable; not for nuisance because plaintiff was not an occupier of the premises in the proper sense of the term; nor for negligence because defendants had no control of the premises, had never invited the plaintiff there, had no knowledge that the lavatory was dangerous after it had been repaired, and were therefore under no duty to plaintiff. On all these points Talbot J. regarded *Malone* v. *Laskey* as distinguishable from *Cunard's Case*. He held that the latter was not a case of nuisance at all, for in nuisance the plaintiff must show some title to the thing to which the nuisance is alleged to be.

Negligence the learned judge defined as ' the absence of the care which a prudent or reasonable man would take in the circumstances ' (pp. 560—561). Once again, if this was applied to the case, it would seem plain that the defendants had failed to show reasonable care in the circumstances. Though it was true that there had never before been an action of this character, where the facts were in any way similar to the present ones, that was no reason why the Court should not apply to it the appropriate principle of justice.

The case follows closely the doctrine laid down in *Heaven* v. *Pender* (1883) 11 Q. B. D. 503 and the very recent case of *M'Alister (or Donoghue)* v. *Stevenson (supra)*. That case related to dangerous chattels; this to dangerous premises.

C. J. M. A.

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TORT—NEGLIGENCE—COLLISION BETWEEN MOTOR-CYCLE AND UNLIGHTED CART — CONTRIBUTORY NEGLIGENCE OF PLAINTIFF MOTOR-CYCLIST ESTABLISHED BY HIS OWN EVIDENCE.

*Baker* v. *E. Longhurst & Sons, Ltd.* [1933] 2 K. B. 461.

ON a dark evening, shortly after lighting-up time, a horse drawing an unlighted cart belonging to the defendants was run into from behind by the plaintiff, travelling in the same direction on a motor-bicycle. The plaintiff brought an action in the county court for injury caused by the alleged negligence of the defendants' servant in not having a light. The county court judge awarded damages on the ground that the defendants had failed to prove contributory negligence against the motor-cyclist. In the Divisional Court Talbot J. thought this was a decision based on a point of fact and therefore it could not be disturbed. Acton J., however, held that the evidence was all one way on the question of contributory negligence, and that plaintiff ought not to recover.

This view was upheld by the Court of Appeal, who gave judgment for

the defendants. The chief argument for plaintiff was that the onus of proving contributory negligence was on the defendants (*per* Lord Watson in *Wakelin* v. *London and South Western Ry. Co.* (1886) 12 App. Cas. 41, 47), that they had failed to do so, and that the county court judge had decided as a point of fact that plaintiff was not negligent.

The Court of Appeal followed *Sharpe* v. *Southern Railway* [1925] 2 K. B. 311. In that case the plaintiff was asleep in the last coach of a train, so long that it overlapped the platform at the station where he wished to alight. A porter shouted to passengers to keep their seats till the rear portion of the train should draw up to the platform. The plaintiff, however, woke suddenly and, fearful of being carried on, got out hastily without looking, fell to the ground and broke his leg. Lord Atkin there said: 'The plaintiff in his own evidence conclusively proves that even if the defendants were negligent, their negligence was not the cause of the accident, but that it was brought about by his own lack of care.' In the present case, on the plaintiff's own admissions—that he could stop in ten yards, that his light showed thirty yards ahead, and that he saw the cart too late to apply the brakes at all—he must either have been going too fast for his range of vision or else was not keeping a proper look-out, and in either case was guilty of contributory negligence. In commenting on several previous cases of a similar type (of which *Tart* v. *Chitty* [1933] 2 K. B. 453 alone had been reported) Scrutton L.J. warned all drivers of motor vehicles at night, especially motor-cyclists, that they must drive at such a speed that they can pull up within their range of vision.

Greer L.J. rightly distinguished as the only question of law in the case the point whether a judge could find contributory negligence against the plaintiff on his own admissions or on the undisputed facts. This had been decided in *Sharpe* v. *Southern Railway* [1925] 2 K. B. 311; and the facts alone here conclusively proved contributory negligence against the motor-cyclist.

Since the decision of the point referred to by Greer L.J. the Court had applied the ruling to several motoring cases of a very similar nature, and their decision here could hardly have been otherwise. The rule is particularly susceptible of application to cases of this type, as there are frequently no witnesses of an accident. While, of course, any action for negligence must be decided on the particular facts, yet Scrutton L.J.'s words here go a long way towards establishing what is in effect an inverse application of the rule of *res ipsa loquitur* to these particular cases—*i.e.* the fact that the driver of a motor vehicle at night collides with another object, either stationary or moving in the same direction, will raise a presumption that he is in the dilemma pointed out by Scrutton L.J. in his argument, and has therefore been negligent.

R. F. J. L.

[*Tidy* v. *Battman* [1934] 1 K. B. 319 was decided too recently for annotation by our contributor. There, the Court of Appeal differed entirely in composition from that in *Baker* v. *Longhurst* (*supra*), and two of its members, Lord Wright and Slesser L.J., were of opinion that the decisions in *Baker* v. *Longhurst* and *Tart* v. *Chitty* (*supra*) are applicable only to the particular facts there present, and that they lay down no general principle of law. It is unfortunate that neither Lord Wright nor Slesser L.J. stated exactly what they disliked in *Baker* v. *Longhurst*, but we infer that it was Scrutton L.J.'s *dictum* (at p. 468) which they declined to accept

as a general rule of law: 'If a person rides in the dark he must ride at such a pace that he can pull up within the limits of his vision, and if, in those circumstances, he strikes something, either he is going too fast or he has not been keeping a proper look-out.' Apparently the Court of Appeal had said the same thing in four earlier cases (pp. 465—466). *Tidy* v. *Battman* thus leaves the law in a somewhat uncertain condition; but we venture to think that the view of Lord Wright and Slesser L.J. is the correct one. Cf. 49 L. Q. R. 159—61.—Ed.]

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Tort—Negligence—Injury to Infant—Duty Towards Children in Respect of Attractive Dangers—Injured Child a Trespasser.

*Donovan* v. *Union Cartage Co., Ltd.* [1933] 2 K. B. 71.

The defendants left unattended in the street outside their premises an unhorsed van. The plaintiff, a child aged seven years, while playing in the street, climbed on to the van, fell and was injured. In this action the infant plaintiff alleged (1) negligence on the part of the defendants in leaving the van unattended in the street, where they knew that children were in the habit of playing, to whom it would inevitably be an attraction of a dangerous nature, (2) nuisance in leaving the van where it was.

The defendants urged that the infant was guilty of contributory negligence, being of an age to know that it is dangerous to climb about on vans; also, that the infant was a trespasser and that he knew of, and impliedly agreed to accept, the risks involved in his climbing on to the van.

In the county court the action was dismissed without calling on the defence; the plaintiff appealed. The judgment of the Court (Acton and Talbot JJ.) dismissing the appeal was delivered by Acton J., and the main point taken by the learned judge was that an unhorsed van left unattended in the street was not a dangerous object of attraction to children. To be such an attraction, the object must possess some attribute which renders it dangerous in itself, and it must be in consequence of the possession of this attribute that the accident resulting in injury to the child happened. The object may be dangerous because it is in motion, or because it may readily be set in motion, or because it is poisonous, deleterious, or explosive, or because it has such a defect as to be inherently dangerous. If an object satisfies these requirements of danger, and causes injury to children who are attracted to it, then the owner will be liable in damages. But an unhorsed van, even if left in the street unattended and unguarded, is not a thing which possesses some attribute rendering it dangerous in itself. The learned judge said: 'There is, in our judgment, no such element of inherent danger in a sound, stationary and immobile vehicle, such as the van in the present case' (at p. 74). He thus distinguished this case from *Lynch* v. *Nurdin* (1841) 1 Q. B. 29, where a child was injured through his climbing on to a cart to which a horse was attached and which had been left unattended in the street: there the defendant was held liable.

Dealing with the argument that the unattended van left in the street was a nuisance and that, for that reason, the defendants were liable, the

learned judge doubted whether the evidence showed that it was a nuisance. But assuming that it was, what really caused the accident was not this nuisance, but the child's trespass upon the cart; in other words, the nuisance was not the direct cause of the harm. The child's user of the road was in no way obstructed by it; he was committing a trespass in climbing upon it, and so had no remedy against the owners of the van.

This case is of considerable assistance in deciding what is, and what is not, to be considered dangerous for the purposes of the 'allurement to children' rule; it makes it quite clear that if a child is injured by any machine, instrument, etc., he cannot recover unless the thing was of a kind intrinsically likely to cause injury. But, on the other hand, the case adds nothing to the existing law as to when dangers are to be considered attractive to children: this, however, is essentially a question of fact.

There is no conflict between this case and such cases as *Lynch* v. *Nurdin* (1841) 1 Q. B. 29 and *Harrold* v. *Watney* [1898] 2 Q. B. 320, in which the infant recovered although he was a trespasser. In those cases the thing causing the injury was a nuisance, while in the present case, even if there was a nuisance, that was not the decisive cause of the accident.

H. B. C. H.

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TORT — REMOTENESS OF DAMAGE — MEASURE OF DAMAGES — EXPENSE INCURRED THROUGH IMPECUNIOSITY OF PLAINTIFF HELD TOO REMOTE.

'*Liesbosch*,' *Dredger* v. *S.S.* '*Edison*.' [1933] A. C. 449.

THE *Edison* in proceeding to sea from the port of Patras fouled the moorings of the dredger *Liesbosch* and carried her out to sea, where she sank and was lost. The owners of the *Liesbosch* (the appellants) issued a writ in Admiralty, and when the respondents admitted sole responsibility this claim was referred to the Registrar and Merchants to assess the damages.

Ths appellants, who were civil engineers, had entered into a contract with the Harbour Board of Patras for the construction of piers and quay walls. The work involved a considerable amount of dredging, and it was on this work that the appellants were using the *Liesbosch*.

There was evidence that, at the time she was lost, there were dredgers available in Holland by which the *Liesbosch* might have been replaced, but the appellants were unable to purchase one owing to the fact that all their liquid resources were engaged in the undertaking and in the deposit which they had made under the contract. Under threats by the Board to cancel the contract, the appellants, not having the capital to buy a dredger, were forced to hire the only one available at a high rate of hire. She was much more expensive to work than the *Liesbosch*. Meanwhile work had been suspended as the Board would not let the appellants do the other work until dredging was resumed. The high rate of hire proving burdensome to the appellants, the Board purchased the hired dredger, and resold her to the appellants on easy instalment terms.

The claim of the appellants was in five parts:—

(1) The price of the substituted dredger.

(2) Overhead charges during the stoppage.

(3) The hiring expenses of the substituted dredger.

(4) The extra expense, for the hiring period, of working the substitute dredger.

(5) Profit lost owing to the stoppage.

The Registrar in substance allowed the claim. On a motion in objection to the Registrar's report, Langton J. ([1931] P. 230) disallowed the respondents' objections that the damages claimed were too remote, and confirmed the report. He held that the respondents must take the appellants as they found them, and refused to strain his imagination ' after a notional phantom which will be recognizable when intellectually captured as the " normal dredger owner " ' (p. 238). On appeal, the Court of Appeal ([1932] P. 52) allowed the appeal, holding that the Registrar had proceeded on a wrong basis in allowing damages which were too remote, and that the only damages recoverable were replacement costs.

In the House of Lords, Lord Wright, in a judgment which was concurred in by the rest of the Court, upheld the decision of the Court of Appeal on the main question. His Lordship held that the fact that, but for their financial embarrassment, the appellants could have replaced the *Liesbosch* at a moderate price, and with comparatively short delay, made the damages claimed too remote: ' In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons. In the present case if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote, but I prefer to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger ' (at p. 460).

Lord Wright held, however, that the measure of damages was not simply the replacement cost, but was to be assessed by taking into account the market price of a comparable dredger, the cost of adaptation and of transport to Patras, and loss incurred through stoppage until a new dredger could reasonably have been available.

Since 1921 there has been a paucity of authority on the question of remoteness of damage, for, as Sir Frederick Pollock says, we cannot rewrite the judgments of our ancestors in the light of the *Polemis Case*. Time will remove the difficulty, and this case is an important step in that direction, for it illustrates a *nova causa interveniens* which, one would think, should be of general application. On the question of the authority of the rule in the *Polemis Case*, the case has no bearing one way or the other.

J. K. T. J.

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We are indebted to Mr. J. L. Montrose, of University College, Hull, for the following note:—

*Andrews Brothers, Ltd.* v. *Singer & Co., Ltd.* [1934] 1 K. B. 17.

Where there is a contract for the sale of peas the seller's obligation is to deliver peas and the buyer's obligation is to accept peas. If beans are delivered the buyer is under no obligation to accept; he may reject; this is not because of any ' condition ' but because he is only under an obligation to accept peas; acceptance of beans gives rise to a different

contract. Moreover the seller is liable in damages; this is not because there is a warranty or a 'breach of condition treated as a breach of warranty,' but because the delivery of beans is non-performance of the promise to deliver peas. These remarks are an amplification of the well-known *dictum* of Lord Abinger in *Chanter* v. *Hopkins* (1838) 4 M. & W. 399, 404. However, the treatment of 'conditions' and 'warranties' in the Sale of Goods Act, in the equally well-known judgment of Fletcher Moulton L.J. in *Wallis* v. *Pratt* [1910] 2 K. B. 1003; [1911] A. C. 394, appears to have obscured these clear principles, so that the judges in *Wallis* v. *Pratt* were not aware of their direct applicability. In *Andrews Brothers, Ltd.* v. *Singer & Co.* [1934] 1 K. B. 17 the Court of Appeal has applied these principles, though there is no express statement of them.

In *Wallis* v. *Pratt* the 'peas' were common English sainfoin and the 'beans' giant sainfoin. The buyers sold the seed, and not until the seed had come up was it discovered to be giant sainfoin, nor were the sellers sued until then. The sellers relied on a clause of protection 'Sellers give no warranty, express or implied, as to growth, description or any other matter.' But the buyers did not have to rely on a warranty, and the argument based on section 11 of the Sale of Goods Act (that a condition can be converted *ex post facto* into a warranty) could also have been similarly treated, for they were not relying on a 'condition.' Fletcher Moulton L.J., whose judgment was adopted by the House of Lords, did not, however, thus refute the argument based on section 11, for he took the view that the terms of a contract of sale of goods are either conditions or warranties.

This latter view is rejected, it is submitted in *Andrews Brothers, Ltd.* v. *Singer & Co.* Sellers sold a 'new Singer car,' subject to a particular warranty, the protection clause excluding 'all conditions, warranties and liabilities implied by statute, common law or otherwise.' This clause was wider than in *Wallis* v. *Pratt* to the extent that it included 'conditions' and 'liabilities': narrower in so far as it referred only to '*implied* conditions, warranties and liabilities.' A Singer car was delivered to, and accepted by, the buyers, who then discovered that the car had already run a considerable mileage, and was therefore not 'new.' They sued the sellers for breach of contract. The sellers relied on the protection clause, maintaining that their obligation to deliver a new Singer car was an 'implied condition,' for by section 13 of the Sale of Goods Act, 'where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description.' The answer to that argument was that there was an express liability to deliver a new Singer car, on which the buyer could rely, without calling in aid any condition, express or implied. Both Scrutton and Greer L.JJ. called the phrase 'new Singer car' an express term, without 'describing' it either as a condition or a warranty; and the seller was held liable.

Much of the difficulty in this branch of the law consists in using the term 'condition' as equivalent to a certain kind of promise. It should be confined to clauses modifying or abrogating promises. Instead of saying a promise, breach of which gives the purchaser a right to reject, is a 'condition,' one can say that the buyer's promise to accept is subject to a condition that the seller should perform his promise. Non-performance is a breach of the seller's promise and gives rise to a claim for damages; it also is a fulfilment of the condition and thus abrogates the buyer's promise to accept. Two classes of transactions at present confused can

be distinguished easily if this terminology is adopted: (a) a contract for the sale of goods of a particular class, and (b) a contract for the sale of goods of a particular class (which may be wider than that in (a)) where the buyer's promise to accept is subject to a condition that the goods are of a particular species. Thus the sale of a 1934 20 h.p. Mercury car with a sliding roof (1) is different from the sale of a 1934 20 h.p. Mercury car where the buyer's promise to accept is subject to the car having a sliding roof (2). In (1) the delivery of a car without a sliding roof would amount to a breach of contract in the same way as a delivery of beans instead of peas. Acceptance would amount to a new contract to buy at a reasonable price not necessarily contract price. (Cf. *per* Acton J. in *Gabriel, Wade & English, Ltd.* v. *Arcos, Ltd.* (1929) 34 Ll. L. Rep. 306.) In (2) the delivery of a car without a sliding roof is not a breach of the seller's obligations. The buyer can reject, but he cannot claim damages; and if he does accept he must pay the contract price. This, it is submitted, is also a solution of the difficulty in the application of a rejection clause stated by Greer L.J. in *Meyer, Ltd.* v. *Osakeyhtio Co., Ltd.* (1930) 37 Ll. L. Rep. 212. A clause that 'Buyers shall not reject the goods herein specified but shall accept or pay for them in terms of contract against shipping documents' applies only to contracts like contract (2), not those like contract (1); in contract (1) there is no rejection of the contract goods. (See *per* Rowlatt J. in *Green* v. *Arcos* (1931) 39 Ll. L. Rep. 84.)

There may be words of description in a contract which are not definitive of the class of goods to which the contract applies, as *e.g.* sliding roof in contract (2) above. Whether particular words of description are or are not definitive is a question of construction. But even if not definitive section 13 of the Sale of Goods Act applies; they are *prima facie* conditions, not warranties. *Prima facie* because section 13 is subject to section 55, which provides that the rules laid down in the Act may be varied by the agreement of the parties.

# BOOK REVIEWS.

*Courtney Stanhope Kenny.* By Professor Hazeltine, F.B.A. From the Proceedings of the British Academy. Vol. XVIII. London: Humphrey Milford, Amen House, E.C. (3*s.* 6*d.*)

Professor Kenny has been fortunate in his biographer, for this sixty page memoir is in this sense a biography that it gives a striking picture of the man behind the writer and law lecturer. Professor Hazeltine, Kenny's successor in the Downing chair, has taken very great pains with his materials and has added that sympathetic appreciation which only personal knowledge and friendship can give. The result is a sketch of the life and work of an eminent law teacher which any student would be the better for reading.

No one who knew Kenny can help believing that he would have had a successful career at the Bar, and would have been, if appointed, an admirable judge; but he married in the year after taking his degree and being appointed a lecturer, and he seems to have decided once for all for a quiet academic life at Cambridge. He did indeed for some years practise in the Courts in London and for the greater part of his life was a frequent attendant, especially at the Central Criminal Court, but this was in the interest of his teaching and writing to keep himself in touch with the working law. It would almost seem as if this might have been the reason for his by no means ineffectual three years in Parliament, from 1885 to 1888; for a few sessions in the House where so much of the law is made and which is in many other ways a centre of the national life must be a great asset to a teacher of law and perhaps even more to a lecturer on Jurisprudence. But when he found that attendance in Parliament was not compatible with the efficiency of his teaching at Cambridge he resigned his seat, at that time one of the safest seats in England.

All law students and thousands of practising lawyers know his 'Outlines of Criminal Law,' one of the best of legal text-books, and his case books on Criminal Law and Torts, and he lives in the memories of all Cambridge law students for more than fifty years after 1875 as, in Professor Hazeltine's words, 'unquestionably the most successful of all Cambridge law teachers of his time.'

There are few men now living who can remember the commanding position which he held in the Union debates, for he was as good at a quick reply as in a set speech. One can only recall one tradition of his Union days. A speaker who added to his general fatuousness a curious want of judgment in his choice of epithets had ended an attack upon Non-conformists by speaking of them as 'uncircumcized Philistines.' Kenny followed him and his opening words 'The honourable, and I presume circumcized, member' prepared the House to enjoy the castigation which succeeded.

He had come to be regarded as, in Professor Pearce Higgins's words, 'so essentially the "reasonable" man of the Law of Negligence' that few people realized that the 'originally strongly passionate child,' of

which the memoir tells us, still lived under iron control, and reappeared only when Kenny's feelings were deeply stirred. One has memories of a General Election in the far past and of a crowded and excited Guildhall meeting on the eve of the poll, and of Kenny in an eloquent and impassioned speech indicting the outgoing government for many of the more serious crimes in his 'Outlines,' ending up with the contemptuous 'I accuse them finally of Petty Larceny.' It was a fine speech, but must have been something of a surprise to those who looked upon him as the incarnation of calm reasonableness. There were also, no doubt, some surprises for people who, regarding him as what is commonly called progressive, found him in some matters, especially in University questions, strongly conservative. The explanation perhaps was that, loving the University and his college as they were, he was not convinced that proposed changes would make them better, but was quite sure that they would make them different, and he was not willing to take any risks.

In most long lives one can see processes of evolution or at least of change; a Gladstone starting as a conservative lives to disestablish the Irish Church and threaten the Union; a Disraeli beginning life as a radical free lance dies a trusted support of throne and altar. These, though extreme cases, are not isolated ones. Kenny would seem to have made up his mind early on most fundamental questions and to have adhered to his early convictions through life. These convictions were strongly held, for he was least of all men a half-believer in a casual creed, and one always had the feeling that they really regulated his conduct even in matters which most people leave to the impulse of the moment. No consequences were allowed to weigh where a principle was at stake. Of this his taking the chair at Bradlaugh's meeting was an instance. As a deeply religious man he had no sympathy whatever with Bradlaugh's atheism, but he felt very strongly on the constitutional question, and though his action brought him some unpopularity and even the loss of friends he had no hesitation in doing what he thought right.

This notice is open to the criticism that it lays stress on those aspects of Kenny's life with which the readers of a law journal are least concerned. But his books are too well known to need discussion, even if one were competent to discuss them, and one of Professor Hazeltine's chief merits is that he makes us acquainted with the various other Kennys beside the author and the teacher—the admirable chairman of quarter sessions; the man who knew well several other languages and legal systems beside his own; the trusted legal adviser of the University and of his college and of countless persons who went to him with their difficulties, and never in vain; the man of deep religious feeling and at the same time of broad views; the generous anonymous helper of causes and of persons. Very few can have known all that lay behind the reticence, formality and apparent coldness of his manner.

HENRY BOND.

*Geschichte der Stellvertretung (Agency) in England: zugleich ein Beitrag zur Entwicklung des englischen Privatrechts.* Von Dr. Hans Würdinger, Privatdozent an der Universität München. Marburg in Hessen: Elwert'sche Verlagsbuchhandlung, G. Braun. 1933. 478 pp.

Dr. Würdinger's monograph on the history of agency in English law is a contribution to the series of *Arbeiten zum Handels-, Gewerbe- und Landwirtschaftsrecht*, edited by Professor Heymann, Brunner's successor at Berlin. Although he considers some of the modern developments, the author is chiefly concerned with the medieval aspects of his subject; and, although dealing primarily with agency, he has at the same time touched upon many other features of medieval law which have a bearing upon his theme. Indeed, the scope of the essay is much broader than agency, for there are important sections dealing with contract, real property, and procedure in their relation to the growth of agency. Thus, for example, much space is devoted to the history of the law of contract in order that the growth of agency in the formation of contracts may be better understood. While agency in Anglo-Saxon times and in the early periods of the common law figures prominently, the growth of representation in equity and commercial law has not been neglected; and, moreover, the English development has been explained by, and in some respects compared with, the history of agency in continental legal systems of the medieval epoch.

Dr. Würdinger's essay, which is a valuable contribution to our knowledge of certain parts of English legal history, is one out of many illustrations of the great interest shown by present-day German scholars in the history and system of our Common Law, an interest partly attributable to the attention paid to early legal development in England on the part of Konrad von Maurer, Heinrich Brunner, and Felix Liebermann during the latter part of the nineteenth century. In the present work the author has given clear evidence of an intimate acquaintance with English medieval authorities, such as the Anglo-Saxon laws and charters, Bracton's *De Legibus*, and the Year Books; and he has also based his results on a close study of the voluminous literature on English legal history that has appeared since Maitland, Vinogradoff, Holmes, Ames, and other recent scholars began to write. Even very late works, such as Professor Stenton's *First Century of English Feudalism* (1932), are brought into the author's treatment of his subject.

Attention may be drawn to a few out of many topics of interest embraced in the work. Thus, although in his view the *Vorsprecher* of our early law (see Liebermann, *Gesetze der Angelsachsen*, s.v. *Vorsprech*) played no rôle in the development of agency (p. 43), the author holds that the *attornatus* was 'a representative in the technical sense, *i.e.* he represented the absent party before the court' (p. 56; and see also pp. 44 ff., 130, 189, 283 ff., 408): it is regrettable, however, that in this part of his essay the author has not taken account of the material assembled by Mr. Herman Cohen in his *History of the English Bar and Attornatus to 1450* (1929). Another matter which will attract the interest of the legal historian is the author's treatment of the place of agency in effecting conveyances of land during the Anglo-Saxon, Norman, and Angevin periods (pp. 58—148). Without entering into a discussion of the many historical problems which have been raised, it must suffice to observe that in the

present-day controversy as to the nature of the juridical act of conveying book-land in Anglo-Saxon times, Dr. Würdinger holds to the doctrine which Brunner made memorable in his *Rechtsgeschichte der römischen und germanischen Urkunde* (1880). But, although he follows Brunner's view that the book itself was dispositive, not merely evidence of the conveyance, and that in fact the delivery of the book conveyed the land without the necessity of a formal transfer of possession, the learned author sets out in some detail the more recent view that the conveyance of book-land was an oral and formal act before witnesses, of which the document itself was evidence (see pp. 79—109). The history of formal, real, and consensual contracts, and of the employment of agents in their formation, constitutes one of the most important parts of the book (pp. 149—303): the account of the early consensual contract throws light upon the nature of Glanvill's '*privatae conventiones*' and of final concords (see pp. 273—290). In the latter part of his treatise the author considers, *inter alia*, the historical relation between the *Treuhand*, notably the donee to uses, and the agent (pp. 304—344). At the very end of the book there is a useful summary of the principal results of the author's learned researches (pp. 445—465).

No serious student of English legal history can afford to neglect Dr. Würdinger's scholarly study of agency. He has covered an extensive field in a systematic manner; and he has relied in general on medieval authorities as the basis for his conclusions. His views on some subjects will, however, lead to controversy and further research. One such subject is Holmes's thesis that the fiction of the identity of principal and agent is the historical basis of the modern law of agency (see 'The History of Agency,' *Select Essays in Anglo-American Legal History*, iii, 368—414). Dr. Würdinger maintains that from the standpoint of historical development, this doctrine cannot be supported (see pp. 11, 241).

H. D. H.

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*Lush on the Law of Husband and Wife.* Fourth edition. By S. N. Grant-Bailey, of the Middle Temple, Barrister-at-Law. With an Introduction by the Right Hon. Lord Atkin of Aberdovey. London: Stevens & Sons, Ltd. 1933. clxvi and 753 pp. (£2 2*s*. net.)

Mr. Grant-Bailey is to be congratulated on his success in re-editing a standard text-book which has been for many years in constant use by members of the Bench and Bar. The original work, which appeared in 1884, was given a second edition in 1896 under the care of the Author and Mr. Walter Hussey Griffith; while in 1910 the third edition was published with Mr. Griffith as sole editor. The new edition, which, after the lapse of twenty-three years from the date of the third edition, was clearly needed, has now appeared, very appropriately, exactly fifty years after the coming into operation of the Married Women's Property Act, 1882, an enactment which began a radical change in the legal position of the wife respecting property, obligations, and actions.

The new edition is the product of the labour of three men—the Author, Mr. Griffith, and Mr. Grant-Bailey: it is no longer the original work, for in the process of editing, many changes have been made in the text as

Lush composed it. Mr. Grant-Bailey's share in this transformation of the book has been very considerable; and, indeed, in his own words, 'the whole work has been comprehensively revised and thoroughly modernised.' Five of the old chapters have been completely rewritten, and four new ones have been added, while the scope of the work has been much enlarged by the inclusion of all topics which affect the pockets of the two spouses. Many other new topics have been considered; and approximately seven hundred cases have been added to the thousands which appeared in the lists of the earlier editions. In the Appendices (pp. 605—670) will be found the relevant statutory provisions, forms of judgment, writs, and orders, as well as the Rules of Court. The tables of cases (pp. xix—cxlix) and statutes (pp. cli—clxvi), and not less the Index (pp. 671—753), have been carefully prepared. The *Addendum* (p. clxvi) brings the cases down to October 2, 1933.

Mr. Grant-Bailey draws attention to the fact that, while the law operative before January 1, 1883, is bulky and affects few, 'statute and case law have in the past twenty-two years been racing in an attempt to keep abreast of the revolutionary change in social outlook'; but he has retained 'the old matter so far as is requisite to an understanding of the subject as it affects to-day the vast majority' (p. v). There can be no doubt that the sacrifice of a considerable part of the old matter, and even more so the inclusion of much new matter, will be welcomed by the present-day practitioner. At many places, moreover, the editor has made his own comments on the old and the new law; and his point of view in criticism is modern. As an illustration of this feature of the work attention may be drawn to the pages devoted to the action for enticement at the husband's and at the wife's instance (pp. 34 ff.; and see also p. clxvi), wherein the recent case of *Place* v. *Searle* [1932] 2 K. B. 497, C. A., is discussed and the still later case of *Newton* v. *Hardy* (*Mrs.*) *and Husband* (1933) 49 T. L. R. 522 is mentioned. On this and many other topics the editor has not contented himself with a bare statement of the legal rules: he has introduced his own reasoned views in regard to them. Criticism has brought life into many parts of the book.

Speaking of the editor, Lord Atkin in his brief Introduction (pp. clxvii —viii) remarks: 'He has brought immense industry and much learning to bear upon his task; he is a thoroughly equipped lawyer: and he has left me with the impression that the new edition is worthy of the original work.' Lord Atkin adds: 'I cannot myself find a higher recommendation, and in that belief I commend it to the profession.' This will be, it may well be thought, the judgment of all members of the profession who carefully examine Mr. Grant-Bailey's work as editor. The book in its new form covers all the varied relations which arise out of the marriage bond or its dissolution; it presents the law as it is enforced by the Courts of our own day; and it preserves the scholarly qualities of the workmanship of Lush himself. By his painstaking labour, which must have cost him much time, Mr. Grant-Bailey has restored this classic of our legal literature to the list of those works which deal with the current law upon a highly important subject.

H. D. H.

*Children and Young Persons Act, 1933.* By A. E. Ikin. London: Sir Isaac Pitman & Sons, Ltd. (10*s.* 6*d.*)

*The Law of Child Protection.* By E. E. Bowerman, M.A. London: Sir Isaac Pitman & Sons, Ltd. (10*s.* 6*d.*)

The tendency of English law has long been to hedge the infant around with protection. This has been carried to such an extent in every branch of the law that a foreigner might well get the impression that an English youth suffers from retarded development when compared with the youth of other countries.

Up to a point, and to a reasonable age, children needed protection; both physically, from abuse, by the Criminal Law; and economically, from exploitation, by statutes controlling employment. Miss Bowerman's little book is a useful outline of the law concerning protection and governing of children, without much comment, and containing appendices of the relevant sections of several statutes. Mr. Ikin's book sets out the Children and Young Persons Act, 1933, in full. This is followed by a commentary on the Act, section by section, with references to cases wherever any are applicable, which is not very often, as much of the Act is still an experiment. The remainder of the book consists of some very useful appendices, covering statutes and rules as to entertainments, probation, Borstal institutions, habitual offenders, employment of children and women, and adoption of children; circulars of the Home Office to local authorities; and statistics as to the employment of children. On the whole, the two books should be a very effective help to those responsible for administering the Act, and a valuable source of information to anyone who reads them.

Our great complaint against these books is that they do not tell enough. They are history so far as the past is concerned, but not enough history, for we want to know what arguments support many of the things contained in the Children Act, 1933. Why did the Legislature take it for granted, as it apparently did, that all criminal children are the victims of bad economic and social conditions? The commentary on the Act gives explanations, not reasons, and no criticisms. A study of any set of Criminal Law Reports will show that no class has a monopoly of producing criminals.

As our authors make little analysis of the Act, we must do it for ourselves. A great deal of the Act of 1933 concerning physical protection of children is codification of powers long exercised by the Court of Chancery, and of various statutes curtailing the father's Common Law rights over his child. Legislation had already done nearly all that was necessary to protect children from exploitation in factories and other work. The Act of 1933 repeals some of this, and re-enacts it with various changes, such as cutting down hours of employment, raising the age for street trading from fourteen to sixteen, limiting the employments open to children at certain ages, making it clear that the conditions of school attendance take preference over conditions of employment, codifying laws respecting protection of workers from injuries, and providing machinery to see that all this is enforced. Much of this was done after consultation with local authorities, and the average opinion seems to be pretty fairly expressed. All this is admirable. Our one comment might be that there is just a little too much of the unfortunate tendency of English legislation to take it for granted that children—and others—do not want to work, and to keep them from it.

The ideal system would be to prevent exploitation, but to leave some choice in the matter to the party concerned.

A great deal of the Act of 1933 is concerned with preventing children (under fourteen) and young persons (between fourteen and seventeen) from drifting into crime. The principle seems to be to get hold of delinquents as young as possible, try them with the least notoriety possible, and sentence them to special treatment designed to teach them to be useful and responsible citizens. The object is laudable, but the machinery established for attaining it is revolutionary, and the value of some of it is questionable.

Very wide powers are given to various bodies and persons to bring a child or young person before the Court, varying from arrest in certain cases to bringing there any child in need of care or protection. Special Juvenile Courts are to be set up in every Petty Sessional Division, presided over by a panel of justices specially qualified for dealing with juvenile cases. In all cases the welfare of the child or young person must be the predominating consideration of the Court. The Court has wide powers of committing to an approved school, or to the care of a fit person, and some powers of awarding the lesser punishments. The general public is excluded from the Court, and newspapers can be forbidden to publish any information by which a child connected with any trial for an offence contrary to decency or morality might be identified.

One or two points arise. The average age of English justices is high; it is doubtful whether enough with special qualifications (it has been suggested that youth is an important one), who are willing to act, can be found.

The Act puts a great limit on punishments; children are not to be sentenced to penal servitude or imprisonment; young persons not to penal servitude, and no one under eighteen is to be hanged. No reasons whatever are given for raising the age for capital punishment to eighteen. If we are to have capital punishment at all, let us be impartial in administering it. Some of the most callous and vicious criminals in English criminal history have been under eighteen. We can understand leniency to a child who kills someone, for he may not have reached an age to appreciate the seriousness of taking a life; but he has reached an age of responsibility long before eighteen, if he is ever going to reach it. Many ' young persons ' are intelligent criminals, and it will soon be common knowledge that serious crimes can be committed up to the age of seventeen without entailing any very serious consequences to the criminal. The old law had reached a stage where young offenders looked on it as a right to be bound over on a first conviction; and this increased leniency will not help matters.

Much care has been taken in the Act of 1933 to bring home to the parent a sense of his responsibilities. Some mercy to the parent is needed, or we shall be asked for a Parents' Charter. A parent gifted with a child somewhat more lively than the ordinary might be tempted, on reading the Act, to emigrate at once. There is much mention of ' unfit ' parents and ' fit ' persons, without any attempt at defining unfitness and fitness. A parent must protect his fire-grates; provide spectacles for his child when required; pay contribution when his child is condemned to an approved school; pay his child's fines and damages and costs, if the Court thinks he has been remiss; and be distrained upon, imprisoned and fined for failure to do so. It is difficult to see how imprisoning the parent is going to reform the child, but no doubt it will be ordered, quite irrespective of the parent's ability to pay. It is an age of bureaucracy, and there will

be considerable sympathy with the parent who first drops an inspector out of the window.

H. B.

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*London Prisons of To-day and Yesterday.* By Albert Crew. London: Ivor Nicholson & Watson. (10*s.* 6*d.* net.)

There have been rumours of a heightened consciousness in Soviet Russia regarding the defects of prison administration generally, and of earnest efforts at establishing a successful punitive-reformatory prison system. It will be interesting when reliable details come to hand; at present authors and speakers are confined to saying that in Russia crime is being recognized as a mental disease, not necessarily the result of depravity, but often of bad economic and social conditions.

In England, on the whole, public opinion seems to be hostile to prison reform. The author of this book points out that those who have most to do with sending people to prison, judges and magistrates, know very little about prisons; and the general public know less. The two prevailing opinions are that a prison is either a place for punishment where the people who are in it ought to be made to feel why they are there, or a happy home provided by the government. Both views are wrong, but true reform of prisons, and the consequential reform of prisoners, will be retarded until people know more about prisons. The object of this book is to inform the public about prison life, and to create interest in the prisoner.

The chapters on prison history are good, although the author did not choose the worst of eighteenth century prisons in selecting Newgate for description. He justly emphasizes that the moral cruelty of the nineteenth century, by its efforts to make the prisoner repent in suffering, was worse than the physical cruelty and indifference of an earlier age.

Beginning with John Howard's activities, and ending at the present day in centralized control of prisons, one can say that both physical and moral cruelty have disappeared. But the situation is now more or less stationary; we have not yet reached the stage of less interest in the prison and more whole-hearted interest in the reform and education of the prisoners. Much has been done; the Borstal system is a success; classification of prisoners is helpful; the system of granting privileges for good conduct; the probation system; the work of prison visitors; the help given by discharged prisoners' aid societies; all have done something towards helping the prisoner to become a useful member of society. Here the author is weak; he describes Holloway and Wormwood Scrubs as present-day examples, explains in detail the system used in these prisons, but makes very few constructive suggestions beyond urging that the general policy of Wormwood Scrubs and Wakefield Prisons should form the guiding principle of all prisons. This is not tackling the problem.

The author makes it clear that one great difficulty in reforming the prisoner is in finding suitable work for him. Whatever he is taught to make with his hands in prison, he will find when he comes out that it is made more quickly and cheaply by machines. Again, there is the difficulty of disposing of prison-made goods. The Trades Unions' ban on such goods coming into the market in competition with goods made outside

confines the market to the limited requirements of government departments. At the same time no objection is made to competition from foreign goods produced under conditions that would not be tolerated in England, and dumped here at correspondingly competitive prices. The governor of one English prison was not permitted to sell in the open market certain goods made in his prison; subsequently he found similar goods made in Czecho-Slovakian prisons on sale in the English markets. Until this anomaly is remedied there is no hope of keeping the prison population fully employed at useful work.

The statistics are interesting. In 1931 43 per cent. of criminal proceedings were traffic cases. Apart from traffic cases, there has been a decrease in recent years in crime generally. It is interesting to find that there were 3,718 prisoners in Brixton Prison in 1932 for debt. The author seems rather to approve of imprisonment for debt; but we submit that the Debtors Act, 1869, is pretty well eaten up by the exceptions, and it is time it was revised. For county court debts and income tax the full amount must be paid before release from prison; and exacting what useful purpose is served by keeping a person who cannot pay perpetually locked up seems no more obvious now than it did when Fleet Prison flourished in all its glory.

H. B.

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*Ashburner's Principles of Equity.* Second edition. By Denis Browne, B.A., of Lincoln's Inn, Barrister-at-Law. London: Butterworth & Co., Ltd. 1933. lxxx and 520 pp. (£1 12*s.* 6*d.*)

Professor Ashburner's work, of which the first edition appeared thirty years ago, achieved for itself a high reputation, and a new edition, incorporating subsequent changes in the rules of Equity, is more than welcome.

In view of the heaviness of the task of renovation after such a lapse of time, a few inaccuracies and omissions were inevitable, but we must confess that they are rather more numerous than we anticipated.

Thus at p. 40 appears the statement that: 'Since Lord Cairns' Act a patentee whose patent has been infringed . . . has been entitled . . . to an account of profits . . . ,' and no mention is made of section 10 of the Patents and Designs Act, 1919, reversing this rule.

Again, we are told that: 'No formalities are required for the transfer of an equitable interest in property, except that where the interest concerns land it can only be transferred by an instrument which satisfies the requirements of the Law of Property Act, 1925, s. 53.' The conclusion that this provision is confined to land is not justified by the wording of the section, and no reason or authority is given for this construction.

On p. 163, the 'Justice Act, 1893,' should be the Trustee Act, 1893. Elsewhere, the *Stevens* v. *Trevor-Garrick* rule (effect of husband's covenant in marriage settlement) is stated as existing law, and the effect of section 2 of the Married Women's Property Act, 1907, is completely ignored.

The Clandestine Mortgages Act, 1692 (4 Will. & M. c. 16) is also treated as law, despite its repeal by the Law of Property Act, 1925.

The equitable jurisdiction in respect of infants is excluded by reason of its being a delegation of the Sovereign's prerogative as *parens patriae*, and not of his judicial authority, and so sections 31 and 32 of the Trustee Act, 1925, as to maintenance and advancement find no place. The reason is not a very convincing one.

The treatment of powers in the nature of trusts is inadequate, no reference being made to such cases as *Burrough* v. *Philcox* (1840) 5 My. & Cr. 72; *Re Weekes' Settlement* [1897] 1 Ch. 289, and *Re Combe* [1925] Ch. 210; and the principle of *Strong* v. *Bird* is only mentioned in relation to the liabilities of an executor, being ignored altogether when dealing with how a trust may be completely constituted, apart from a footnote to 'see p. 425, *infra*.'

In dealing with a trustee's duty to give information to a beneficiary some reference might have been made to section 137, sub-section 8 of the Law of Property Act, 1925, as to production of notices given by assignees of equitable interests.

There is a short discussion of the position of an executor *de son tort*, but the provision in the Administration of Estates Act, 1925 (s. 28) as to the extent of his liability is not even mentioned. On p. 442, the statement with reference to administration of an insolvent estate under section 130 of the Bankruptcy Act, 1914, that: 'Such an order is not a "second or subsequent receiving order" within section 39 of the Bankruptcy Act, and the estate of a bankrupt remains vested in his trustee in bankruptcy, . . .' is erroneous in view of the new form of section 39 substituted by section 3 of the Bankruptcy (Amendment) Act, 1926.

Of the other omissions we noticed, probably the most serious are those of sections 41 and 42 of the Administration of Estates Act, 1925, and sections 7, 22 and 39 of the Trustee Act, 1925.

Generally, the text is written with a view to the requirements of students, and with adequate explanation, but this is not always the case. On p. 2, for example, in dealing with the equitable jurisdiction to grant relief in the case of lost bonds, *profert in curiam* and *oyer* are spoken of without any explanation whatever. It is not desirable that at the very beginning of a book 'written primarily for beginners' (Preface) they should be confronted with terms which no ordinary student can understand without assistance.

From this point of view, too, the book contains rather more of historical matter and obsolete practice than is needful to enable a student to understand the principles of the system as it now obtains.

'Ashburner,' when it first saw the light, was an excellent treatise. It is still good, but the second edition has not perhaps quite reached the standards of accuracy, comprehensiveness and simplicity of treatment set by works which have been continuously kept up to date in the long interval between the first and second editions of the work under review. We believe that students will continue to find a clearer introduction to the somewhat complex mass of equitable rules in 'Snell,' but the new 'Ashburner' can be recommended to those who have the time and inclination for a second book on general principles.

If a new edition of the book becomes necessary, we hope the editor will discard the practice of putting new matter in brackets. Particularly in a work of this nature, and one which has not been brought up to date for thirty years, such a course is highly undesirable, both as seeming to relegate to a position of minor importance changes sometimes of a revolu-

tionary character, and as rendering the book less easy to read. Reverence for the authority of an author is carried too far when it necessitates the bracketing of over two hundred and fifty passages.

R. H. K.

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*Sutton and Shannon on Contracts.* Being a fourth edition of *Pease and Latter's Students' Summary of the Law of Contract.* London: Butterworth & Co. 1933. lxviii and 369 pp. (12*s.* 6*d.* net.)

This somewhat anomalous practice of renaming a standard students' text-book with each successive change of editors is to be deprecated and in the present instance regretted in that the name of Mr. Pease, on whose lectures at the Inns of Court the original work was based, is relegated to the sub-title. Nor does such a change seem warranted by the extent or thoroughness of the revision. In all, some fifty fresh cases appear, mostly new though some former omissions have been rectified as, for example, *Brandts* v. *Dunlop* [1905] A. C. 461, on Assignment, and *Hyams* v. *Stuart King* [1908] 2 K. B. 696, on a new contract to pay betting losses. Some twenty cases have been omitted.

The introduction has been rewritten and considerably improved. It now constitutes a clear historical sketch on orthodox lines of the development of contract. The introduction to Part II has been expanded by a fuller explanation of such terms as 'unenforceable' etc. Sir Frederick Pollock's view that 'absolutely void' in the Infants' Relief Act, 1874, s. 1, means 'irrevocably voidable at the infant's option' is adopted, though it is submitted that the arguments based on the passing of the property in *Stocks* v. *Wilson* [1913] 2 K. B. 235 and *Pearce* v. *Brain* [1929] 2 K. B. 310 are inconclusive since actual delivery will pass property even under an illegal contract (*per* Parke B. in *Simpson* v. *Nichols* (1838) 3 M. & W. at p. 244), and the difficulty of *Cundy* v. *Lindsay* (1878) 2 App. Cas. 459 (see L. Q. R. xlviii, 309) in this respect is more apparent than real as there the consent was destroyed vitiating alike agreement or delivery. The dangerous comparison at p. 109 of Acceptance and Part-Payment under section 4 of the Sale of Goods Act, 1893, with the equitable doctrine of Part-Performance as applied to section 4 of the Statute of Frauds seems unfortunate and likely to mislead students especially when it is remembered that the statutory exceptions, if indeed they may be so regarded, appeared in section 17 of the Statute of Frauds itself. The articles on Mistake have been recast in the light of *Bell* v. *Lever Bros.* [1932] A. C. 161, which is fully explained. Profuse use is made of Lord Atkin's judgment, amounting at times to redundancy (cf. pp. 113 and 116), and it may be unwise in a book of this character to over-emphasize his more extreme illustrations as 'the old master' and 'modern copy,' as some may regard these as falling into different categories, and it is difficult to reconcile with Art. 62, 2. At p. 118 appears a very convincing treatment of the difficult case of *Phillips* v. *Brooks* [1919] 2 K. B. 243 in the light of Lord Haldane's judgment in *Lake* v. *Simmons* [1927] A. C. 487, emphasizing that Phillips intended to sell to the casual customer before him and to deliver to that same person, notwithstanding that he made the subsequent delivery in the belief that

such person was Sir Geo. Bullough. Restraint of Trade and Severance have received some attention as also Wagers, where *Carlton Hall Club* v. *Laurence* [1929] 2 K. B. 153 is accurately explained. At p. 352 *Drew* v. *Nunn* (1879) 4 Q. B. D. 661 and *Yonge* v. *Toynbee* [1910] 1 K. B. 215 are rightly treated as giving the stranger a right to elect between suing the principal on the original contract by way of an estoppel or the agent on his breach of a warranty of authority and not as irreconcilable as is stated in many books.

Amongst the more important omissions may be mentioned *Slade's Case* (1602) 4 Rep. 92, *Penton* v. *Southern Ry.* [1931] 2 K. B. 103 (criticized by Prof. Hughes, L. Q. R. xlvii, 459, as an extension of *Thompson* v. *L. M. S.* [1930] 1 K. B. 41), any reference to contracts for the benefit of third parties and the trust concept in treating of exceptions to the rule that consideration must move from the promisee at p. 43 (see Corbin in L. Q. R. xlvi, 12); also the Third Parties (Rights against Insurers) Act (20 & 21 Geo. 5, c. 25), may be mentioned in this connexion. The *Lord Strathcona S.S. Co.* v. *The Dominion Coal Co.* [1926] A. C. 108, P. C., should also appear here or at any rate under Art. 162 where four pages are devoted to *Tulk* v. *Moxhay*, building estates, registration and like matters. Page 75, *Re Soltykoff* [1891] 1 Q. B. 413, on Accounts Stated with Infants, is in point. Art. 61 should contain a reference to *Blay* v. *Pollard and Morris* [1930] 1 K. B. 628. *James* v. *British General Insurance Co.* [1927] 2 K. B. 311, on civil liability of insurers for manslaughter by the assured and *English Hop Growers* v. *Dering* [1928] 2 K. B. 174, an important case showing the extent to which free adults may bind themselves should both appear, as also *Morelli* v. *Fitch and Gibbons* [1928] 2 K. B. 636 and *Sullivan* v. *Constable* (1932) 48 T. L. R. 267 on Conditions under the Sale of Goods Act. In treating of *Baily* v. *De Crespigny* some reference to *Walton Harvey* v. *Walton and Homfrays* [1931] 1 Ch. 274 is desirable, whilst *Clayton and Waller* v. *Oliver* [1930] A. C. 209 on damages and *Bolton Partners* v. *Lambert* (1889) 41 Ch. D. 295 on ratification, with its instructive counterpart in *Watson* v. *Davies* [1931] 1 Ch. 455, merit inclusion. The ratio of *Widnes Foundry* v. *Cellulose Acetate Silk Co.* [1931] 2 K. B. 393 requires revision in the light of [1933] A. C. 20, where the case is treated as one limiting liability.

The form of the book is preserved and most of the misprints noted are not serious. As a compendious summary this book is of great value to the student and a reliable guide.

T. H. T.

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*The New Jurisprudence.* By Edward Jenks, D.C.L., Hon. Litt.D., F.B.A., Emeritus Professor of English Law in the University of London. London: John Murray. 1933. xii and 290 pp. (9*s.*)

Dr. Jenks opens his preface with the remark that not more than the usual amount of apology is required for a new book on Jurisprudence. We venture to think that no apology is required for a book of this type, for the author has made a contribution to the subject which comes opportunely at a time when no educated person can afford to be without a proper

appreciation of the existing order, in which law plays so vital a part. This is a book which lawyer and layman alike can read with profit and pleasure, though the layman may find certain chapters (VII, The Legal Person; VIII, Legal Rights and Duties) rather tough meat. It blends history and sociology. Institutions of the law are surveyed and placed in their proper perspective in relation to modern needs with characteristic acumen and, generally speaking, the author finds the result satisfactory. It may be suggested that in particular with regard to the history of contract and the part played by precedent the compression is too severe, but Dr. Jenks has already outlined English law in his previous work—The Book of English Law—and the interested layman should certainly study the earlier book first.

Of particular interest is the concluding chapter—Classification of Law—which accepts and emphasizes the distinction between Public and Private Law. In the past it has for generations been fashionable to minimize this distinction under cover of the plea that all law is administered by the Courts—a plea which has of late been somewhat shaken by the recognition of the judicial functions of other bodies and the inappropriate machinery of the Judicature for the solution of administrative disputes. As the field of Public Law rapidly expands, so to some extent the operation of Private Law is restricted, *e.g.* freedom of contract, use and enjoyment of property. Dr. Jenks finds a place under Public Law for Industrial Law—a comparatively modern term covering much ground—and Military Law; we might add the Law of the Professions. Even the ancient Universities to-day, though in the main autonomous, are regulated by a substantial body of statutory rules which has given rise to a class of professional administrators. The conflict between the Temple and Whitehall may yet have its counterpart in the academic world.

In further justification of the somewhat bold title—the New Jurisprudence—the reader's attention should be directed to the account of the comparative method of jurisprudence (pp. 59 ff.). An Englishman is naturally attracted by the newer school which demands that the subject-matter for comparison shall be a perfectly definite institution studied in relation to contemporary systems of law. Again (pp. 156 ff.) there is an interesting suggestion designed to solve the juristic problem presented by the quasi-personality of unincorporated bodies. Dr. Jenks advocates the practical expedient of a preliminary inquiry, directed by the Court, to ascertain whether an unincorporated society, coming before it either as plaintiff or defendant, possesses the essential features of personality which he would have enacted in statutory form.

Space does not permit of further discussion. We believe the book will do much towards humanizing the study of jurisprudence; its public should include both students for a first degree as well as that wider class of student who desires no technical study of law, but is now helped to his appreciation of law and its problems by such books as the author's *The Book of English Law* and Mr. Fifoot's *English Law and its Background.*

E. C. S. W.

*The Right to Trade.* An Essay in the Law of Tort. By W. P. M. Kennedy, Litt.D., and J. Finkelman, M.A. University of Toronto Press. 1933. ii and 114 pp. ($2.50.)

The first third of the twentieth century has seen a great intensification of the industrial struggle, which has forced upon English judges problems which previously they had been able to evade. Among these there arises the question: 'Within what limits is competition to be permitted?' In this essay on *The Right to Trade* Dr. Kennedy and Mr. Finkelman have tried to determine what answer English law has given to this question. Putting aside for the time being a philosophical discussion of the problem, the learned authors have examined judicial *dicta* in order to see how far the Courts have gone towards the recognition of 'a right to trade,' interference with which may give rise to a right of action at law.

The discussion itself falls naturally into two parts. The first part, which covers the forty-one pages of Chapter II, is 'An Analysis of the Cases to Determine whether there Exists a Right to Trade.' In this chapter the authors have carefully considered a number of judgments, including 'the great trilogy,' consisting of *Mogul Steamship Co., Ltd.* v. *McGregor, Gow & Co.* [1892] A. C. 25; *Allen* v. *Flood* [1898] A. C. 1, and *Quinn* v. *Leathem* [1901] A. C. 495, as well as the more recent leading cases, *Ware & De Freville, Ltd.* v. *Motor Trade Association* [1921] 3 K. B. 40 and *Sorrell* v. *Smith* [1925] A. C. 700. This analysis is executed with great skill and, though it is found impossible to draw any final conclusion as to the recognition of 'a right to trade' by English law, the main issues and the avenues of approach are clearly defined. However, it is felt necessary to express one slight regret. Judicial *dicta*, we are generally told, are only authoritative in so far as they support a definite decision given upon a certain set of facts. In the present essay great care has been taken to bring the various sets of facts to the attention of the reader by incorporating headnotes in the footnotes. Unfortunately, in their quotations, the learned authors have not seen fit to include the actual decisions given by the Courts, and in some cases the uninitiated reader may find some difficulty in determining from the text in whose favour the Court decided.

Having found the consideration of *dicta* undertaken in the first part of the essay not altogether satisfactory, in the second part (Chapters III—VI, pp. 46—114) the learned authors have examined the liability in tort for various types of acts which may interfere, either directly or indirectly, with a person in the exercise of his trade or profession. In the majority of cases such acts will fall within the recognized fields of tort such as fraud, libel, trade libel and so on. However, finally we are faced with 'Acts otherwise innocent, but directed against the plaintiff or a third person and intended or calculated to injure the plaintiff in his trade or calling.' Are such acts actionable if committed by a single individual? Are they actionable if committed by a combination of individuals? In attempting to answer these questions, which are of vital importance with respect to 'the right to trade,' the authors are inevitably led into a consideration of conspiracy in the law of torts, and they find it pleasant to flirt with the doctrine of the abuse of rights.

On the whole, *The Right to Trade* is a most commendable little

book, dealing in a stimulating and suggestive manner with a difficult topic which has not hitherto received the attention which it deserves. Happily, it has been undertaken with an open mind and no attempt to dogmatize has been made where the authorities are confused or conflicting. The authors have been equally successful in refraining from mixing their views of what the law should be with what the law actually is. They have considered the leading cases with exceptional clarity and fullness, the reader being treated to generous quotations from the more important judgments.

One feature of the book is particularly noteworthy—namely, the Appendix of Canadian Cases arranged in chronological order with references to the English cases cited. This will make the work most useful in Canada, and suggests a practice which may well be adopted when standard works on English law are being edited for use in that Dominion.

F. A. V.

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*The Commercial Code of Japan.* Published by the Codes Translation Committee of the League of Nations Association of Japan. 2 vols. Tokio: Maruzen Co., Ltd. 1932.

These two volumes will be welcomed not only by comparative lawyers but also by laymen who transact business in Japan. The translation is of an unusually high degree of merit owing to the fact that it is the work of a committee which included not only several distinguished Japanese scholars but also two well-known English lawyers, Dr. Baty and Mr. Gadsby. English versions of foreign codes often leave very much to be desired, either because the translator resorts to a purely literal rendering of the foreign text, or because the work is often done with a remarkable lack of skill. Accusations of this nature cannot be levelled at these two volumes, which contain an English text of great lucidity and accuracy. The value of the translation is much increased by Dr. Takayanagi's admirable foreword on the history of Japanese Mercantile Law and by the references to the decisions of the Japanese Courts which interpret the provisions of the Code. It should be noted that the existing section of the Code which deals with negotiable instruments will shortly be replaced by two special laws embodying the provisions of the Geneva Conventions of 1930 and 1931. Taken as a whole, Japanese commercial law is founded on German law, but the differences are interesting. The law of trading companies has, for instance, been moulded so as to suit local conditions, but we gather from the preface that it has not been altogether successful, and there are proposals for its amendment. It is a little difficult to avoid the temptation to pursue this point somewhat further, but space does not permit. In conclusion this is a model work of its kind and its value is indisputable, as linguistic difficulties place the original text of the Code beyond the ken of the average English reader.

H. C. G.

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*Plebiscites since the World War.* By SARAH WAMBAUGH. Published by the Carnegie Endowment for International Peace, Washington. Vol. I, xxix and 603 pp. Vol. II, xiv and 614 pp. ($5.)

THESE two volumes form a sequel to Miss Wambaugh's *Monograph on Plebiscites, with a Collection of Official Documents*, published in 1920. Since the Peace Conference, Miss Wambaugh, in addition to her duties as technical adviser of the Peruvian Government for the attempted Tacna-Arica plebiscite, has found time to amass a valuable collection of documents resulting from the many post-war plebiscites, both official and unofficial, and to study them critically. The following enumeration affords some small conception of the amount and the scope of her labours: Schleswig, 1920; Allenstein and Marienwerder, 1920; Teschen, Spisz and Orava, 1920; Upper Silesia, 1921; Sopron, 1921; the attempted plebiscites in Vilna in 1920—1921 and in Tacna and Arica in 1925—1926, and the preparations for the Saar Territory plebiscite of 1935. Vol. I contains an analysis of each of these topics and contains a historical summary, a comparison of the post-war plebiscites, an estimate of the future of the institution and an appendix upon a number of Unilateral Consultations of a plebiscitary nature; Vol. II contains the documents.

The author has not been content to study the documents but has visited the plebiscite areas and made most detailed inquiries of the responsible officials and of the voting population. Her study is thus both well-documented and full of human interest and practical guidance. I feel quite unable to convey to the reader an adequate estimate of the skill, the industry and the sober judgment which have combined to produce these volumes. Miss Wambaugh, without a doubt, has made herself master of a peculiarly intricate problem and no Government involved in a plebiscite in the future could do better than follow the example of Peru and enlist her services as a technical adviser.

A. D. McN.

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*For My Grandson: Remembrances of an Ancient Victorian.* By the Right Honourable Sir FREDERICK POLLOCK, Bart., K.C., Honorary Fellow of Trinity College. John Murray. 233 pp. (10*s.* 6*d.*)

SIR FREDERICK POLLOCK must have challenged or beaten many records for activity in old age, as holder of an important legal appointment (the Editorship of the 'Law Reports'), as Treasurer of Lincoln's Inn, as member of the Alpine Club, as practising member of the London Fencing Club. And surely this book, addressed by a grandfather to a grandson over eighty years his junior, stands alone of its kind. It touches on most of the many activities of its author in a manner so forthcoming that it will compensate to some extent those who meeting him casually may have been disappointed by his modest reticence. It reveals the variety of the non-legal interests of one who in knowledge of the Common Law has had few rivals among his contemporaries.

Cambridge men will turn with curiosity to the account given of the Apostles, a society founded a little over a hundred years ago, whose members are so unassuming that they avoid speaking of it, with the result that few outsiders know who belong or have belonged to it. It is therefore of particular interest to discover from the selection of names given how distinguished the company has been, and presumably still is.

Lawyers will want to know what the author has to say in the chapter entitled 'The Inns of Court and Learned Friends.' They will there find that he learned equity from Lindley as pupil, and common law from Willes as marshal, and that both those successful practical lawyers emphasized the importance of academic study. For Sir Frederick was set by Willes upon the study of the Year Books, and by Lindley upon that of Roman Law. He anticipates the question who have been the greatest English judges he has known, and answers Willes, Macnaghten, and Bowen. The first place in the affection of Bench and Bar was held by Lord Justice Chitty, whose untimely death occurred in 1899.

The Chief Baron, whose baronetcy Sir Frederick adorns, resigned office before the latter began the study of the law. But the grandson piously records the following anecdote, had from the grandfather himself, which deserves a wide publicity. 'When he was appointed Attorney-General in 1834 he had to be knighted, and by consequence to provide himself with a coat of arms. For this purpose he applied to the College of Arms in London, but thought the fees excessive. After some negotiation a messenger called on him from Garter King-of-Arms with a final statement of the lowest possible terms. The answer was thus: "Tell Garter King-of-Arms with my compliments that he may go to the devil *sable* in flames *gules* with a pitchfork *ardent* stuck in his backside *proper*." After which my grandfather being the son of a Scot betook himself to Lyon King-of-Arms at Edinburgh, and there found better contentment.'

H. A. H.

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*Annual Digest of Public International Law Cases, 1923-24.* Edited by Sir John Fischer Williams, K.C., and Dr. H. Lauterpacht. London: Longmans, Green & Co. xlviii and 468 pp. (42*s*.)

As never before in the history of International Law this is the 'Age of the Judge.' This Digest, and the ready acceptance it has won, are proof that the fruits of this renewed judicial activity are not being neglected. This volume, the fourth to appear, completes the record of the ten post-war years, 1919-28, and brings the total number of cases digested up to no fewer than thirteen hundred and fifty-six.

In view of the experience of recent attempts at codification the editors are justified in calling attention to the alternative possibility of developing the rules of international law by a legitimate exercise of creative judicial activity. What this implies may be made clear by three illustrations drawn from this volume. In the *Mavromatis Case*, p. 390, the Permanent Court, in the absence of any provision in the Statute or Rules of Court regarding the procedure when objections to the jurisdiction were

raised *in limine litis*, decided that the Court 'is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.' In the *Morocco Claims Case, Great Britain* v. *Spain*, p. 161, the Rapporteur held himself entitled to apply the Fourth Hague Convention of 1907, by analogy, to the contingency of military action outside war in its technical meaning. In the case of the *Telegraph Company Claims* before the British-American Claims Tribunal, p. 417, the arbitrators, extending the right of a belligerent to deprive the enemy of his sea communications to cover the cutting of submarine cables, justified themselves, saying: 'International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country, resulting in the definition and settlement of legal relations as well between States as between private individuals.'

The Judges then, are not lacking in courage. Can the 'cumulative effect' of these cases fail to show, as the editors desire, 'the value of judicial decisions, not only as a means of discovering existing rules of international law, but also as a powerful factor in its future development'?

B. E. K.

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*Real Property Law.* By G. R. Y. Radcliffe, M.A., of Lincoln's Inn, Barrister-at-Law, Principal of the Law Society's School of Law, Fellow and Bursar of New College, Oxford. Clarendon Press. 1933. xxv and 365 pp. (15*s*. net.)

Dr. Radcliffe has drawn upon his long experience of teaching and practice in producing an excellent text-book on Real Property. It is extremely clear and precise, the arrangement is historical and logical, and the whole plan of it is new. The book is an introduction, but more than an elementary outline, and it is not clogged with detail. It also has a practical tone and, where necessary, the Acts have received the criticism they deserve (pp. 215, 286-7). Twenty-five chapters, about two-thirds of the book, are devoted to the law before 1926. Some of these chapters are purely historical, yet essential to a proper understanding of the land law. Many of the old principles still survive, particularly in the law of easements, mortgages, restrictive covenants and leaseholds, and further, for many years, titles will demand a sound knowledge of the pre-1926 law. The preface strikes a warning note as to this; and it is still true that out of the old fields must spring the new corn.

Every chapter shows considerable thought and a complete mastery of the subject; nice problems are raised and satisfactorily answered. Sound reasons are given at p. 150 for the desirability of registering an estate contract notwithstanding entry into possession under a written agreement for a lease.

It is doubtful whether the rule in *Whitby* v. *Mitchell* can be understood in just over a page of print, notwithstanding the useful note on p. 59. A little more seems necessary on the rule in *Shelley's Case* as a rule of law.

The chapters on Modern Rules of Limitations of Estates, Remoteness of Limitation, and Settlements, are models of clarity and precision. No praise can be too high for the thirteen chapters devoted to the General Principles of the Legislation of 1925; they are excellent and most readable. Slight errors of print appear at pp. 87, n., reality should read realty; 88, sec. 35—53; 182, principle—principal; 293, cautious—cautions. The author may rest assured that he has dealt with 'what is essential to grasping the main elements of the subject'; and we would welcome from him another book, of a more advanced character, on this intricate subject.

T. E. L.

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*The Practising Lawyer's Repertory.* By Alexander Cairns, Barrister-at-Law. London: Sweet & Maxwell, Ltd. and Stevens & Sons, Ltd. 1933. xvi and 434 pp. (16*s.* net.)

This book is an attempt to help barristers, solicitors or practitioners who, in the words of the author, 'are consulted in emergencies by clients who expect some definite assurance at once or desire to verify some point in procedure' and have not the means or the time at the moment to search through many volumes in a library. The subjects are arranged in alphabetical order and reference is made to the relevant portions of statute and case law, which in the more important topics are set out at length. The choice of subjects for inclusion in such a work must perforce be arbitrary and so too must be the selection of the actual aspects of the law to be discussed at length under each title. The difficulty must be to know what to leave out. In such a case it is easy to point to omissions; no reference for instance is made to the cases under R. S. C., Order XI, where service of a writ outside the jurisdiction is permitted and the titles County Court and Trespass are too short to be of much assistance. On the whole, however, the author has done his work well, and many of the titles, *e.g.* those on Distress, Dogs, Bills of Exchange Act, Sale of Goods, Carriers and Infants, to select but a few at random, comprise valuable summaries of those parts of the law most commonly met with in practice. The use of more cross-references would add to the usefulness of future editions of the book; we can find for instance no hint in the four pages devoted to Children that there are also twelve pages later on dealing with Infants, nor *vice versa*; again the title Statute of Frauds deals only with contracts of guarantee and indemnity and does not suggest that on p. 94 there are set out two cases on contracts not to be performed within a year.

These are, however, small flaws in an accurate and useful attempt to fill a long-felt want. Reference is made to some 200 statutes and 500 cases, and the whole book should prove of great value on exactly those occasions indicated by the author in the Introduction.

P. H. D.

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*Company Law.* By H. Goitein, LL.D., Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1933. xx and 327 pp. (7*s.* 6*d.* net.)

Professor Goitein has written a book on Company Law on original lines; 'the core of the whole work is Table A,' which has been divided up and printed at the end of the various sections of the book. By this means the reader obtains a very clear survey of the law applicable to the various portions of Table A. The whole history of a limited company is set out, from its formation as a legal entity (*Salomon* v. *Salomon & Co.* [1897] A. C. 22), until its business passes to debenture-holders and the company is 'nothing but a name' and is accordingly wound up (*Re Chic, Ltd.* [1905] 2 Ch. 345). The book is an excellent statement of the modern law applicable to a limited company and should prove extremely valuable to student, practitioner and accountant alike. The text has been written in an attractive and lucid style and is supported by reference to the latest cases. It is surprising to note that no reference has been made to the means by which a company can increase its capital. On the other hand, the pages devoted to Profit, and especially those to the distinction between Fixed and Circulating Capital (pp. 157—160), and Chapter VIII, which deals with the Borrowing Powers of a Company, could hardly have been improved upon. The only real criticism that can be found is that Company Law is made to appear easier than it really is, and this is due to the fact that the whole law has been compressed into 223 pages, which include as well the text of Table A. This simplification therefore appears inevitable. Professor Goitein's book is to be most thoroughly recommended both as an introduction to the subject and as a clear and accurate exposition of some of the more difficult points which have arisen under the Companies Act, 1929.

P. H. D.

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*Law of Procedure.* Fourth edition. By W. Nembhard Hibbert, LL.D. (Lond.). London: Sir Isaac Pitman & Sons, Ltd. 1933. xv and 127 pp. (7*s.* 6*d.* net.)

The fourth edition of this useful book contains a short account of the New Procedure applicable to the King's Bench, together with eleven pages on Chancery procedure and six on Execution. For detailed exposition reference must be made to the larger works on Procedure, but this book contains not only a very valuable and accurate summary of the various forms of Procedure applicable in the High Court but also in Chapter I a concise account of the jurisdiction of the other civil Courts. We have found no inaccuracies in this edition, although the strict compression of the whole of the law of Procedure in Civil Actions into so small a compass makes it necessary that the book should be used more as a handy book of reference than as a complete exposition of the law. The use of heavy type renders reference to the various important points more swift and easy, and to the student and practitioner alike stands alone as an accurate and concise account of the law of civil procedure.

P. H. D.

*Slater's Mercantile Law.* Eighth edition. By R. W. Holland, O.B.E., M.A., M.Sc., LL.D., of the Middle Temple, Barrister-at-Law, and R. H. Code Holland, B.A., of the Middle Temple, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1933. xlii and 629 pp. (7*s.* 6*d.*)

In this work the student of Commercial Law is offered as good value for his money as he will find anywhere in legal text-books.

A new feature has been added to this edition, in the shape of sixty-six pages containing summaries of ninety-one leading cases with quotations from the judgments. The references to these cases in the text are printed in heavy type, so that the reader knows at a glance whether a reference to the end of the book will provide him with fuller particulars.

As the book is distinctly useful, the time before a further edition is called for is not likely to be long, and one or two points may be suggested for consideration when that happens. The distinction between *Baily* v. *De Crespigny* and *Walton Harvey, Ltd.* v. *Walker & Homfrays, Ltd.*, as to discharge of contract by compulsory acquisition of land to which it relates, is not clearly explained.

On p. 335 the text infers that the Fires Prevention (Metropolis) Act, 1774, applies only to buildings in the Metropolitan district; this seems to take no account of *Sinnott* v. *Bowden* [1912] 2 Ch. 414. There is also a misleading passage dealing with section 47 of the Law of Property Act, 1925, as to a purchaser's rights when the vendor has insured the property sold, giving the impression that the section applies in all cases where property is destroyed by fire after the date of the contract for sale; it is not mentioned that the consent of the insurers is required—in fact the context suggests the contrary—nor that the purchaser must pay a proportionate part of the premium.

Again, it is stated that 'A contract relating to movable property is valid in all parts of the world if it is valid by the law of the country where the contract is made.' This is too wide a statement. For example, illegality by the law of the place where a contract is to be wholly or partly performed invalidates it: *Ralli Bros.* v. *Compañia Naviera Sota y Aznar* [1920] 2 K. B. 287. And at p. 493, as the text deals with the Copyright (British Museum) Act, 1915, mention should have been made of the British Museum Act, 1932.

R. H. K.

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*Practical Building Law.* By Gordon Alchin, M.A., B.C.L., Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1933. xiii and 241 pp. (7*s.* 6*d.*)

A clear and comprehensive little book written for the layman and dealing with those aspects of the law which are of most importance to builders, architects and surveyors.

It is, so far as the nature of such a work permits, generally accurate, and although lawyers may cavil at such points as the use of the term 'good consideration' when valuable consideration is meant, the unqualified statement that 'in order that the acceptance of an offer may be effective it must be communicated to the party making the offer,' and a few others

where precision is sacrificed to brevity and simplicity, we consider that it should be of considerable interest and value to those for whom it is intended.

One bad slip, for which we can think of no justification, occurs in the statement that contracts with corporations (including companies incorporated under the Companies Act) must be by deed; section 29 of the Act of 1929 states the law on the point very differently.

The cases of *Sumpter* v. *Hedges* [1898] 1 Q. B. 673 (obligation to pay for materials used in completing building), *Wolverhampton Corporation* v. *Emmons* [1901] 1 K. B. 515 (specific performance), and *Re Drabble Brothers* [1930] 2 Ch. 211 (fraudulent preference), might well have been included; and the treatment of the subject of Workmen's Compensation is so brief that it is necessarily inaccurate and rather misleading.

The text deals with building contracts, the position of architects, surveyors and valuers, building operations in relation to the public, and employees, and appendices contain provisions of certain statutes relating to by-laws, extracts from model by-laws and memoranda as to by-laws issued by the Ministry of Health.

R. H. K.

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*Law of Education.* By H. J. Simmonds, C.B., C.B.E., Barrister-at-Law, formerly Legal Adviser to the Board of Education, and A. W. Nicholls, M.A., B.Litt., Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1933. xxv and 266 pp. (16*s*.)

With the exception of the law relating to the Universities this book covers the whole field of its subject, as a matter both of public administration and of the law of charitable trusts. It should prove a useful working manual for Education Secretaries and their staffs, as well as for members of Education Committees.

Education law is largely the creation of modern statutes, notably the Education Act, 1921, but the law of educational charitable trusts, now chiefly applicable to secondary schools, is much older. Incidentally the term Public School only makes its appearance in the book in connexion with the seven schools named in the Public Schools Act, 1868. Some idea of the changed attitude to education may be gathered from the author's statement that until 1840 no relief was possible from the interpretation by the Court of Chancery of the term 'Grammar' as having reference to Greek and Latin only. The Grammar School Act of that year enabled the Court to widen the curriculum of such a school, but only if the insufficiency of the endowment rendered it necessary to dispense with the teaching of Greek and Latin or either of them. Not till 1860 did the Endowed Schools Act open the educational door to children of parents not in communion with the Church in whose doctrines religious instruction was afforded under the endowments.

The book is a complete and concise exposition of its subject. It includes chapters on finance and schoolmasters; the latter is an unkindly title having regard to the preponderance of the other sex in the elementary teaching profession.

E. C. S. W.

*Cambridge University Studies, 1933.* Edited by HAROLD WRIGHT. London: Ivor Nicholson & Watson. (10*s.* 6*d.*)

'HE was a natural editor.' So Mr. H. D. Henderson described Mr. Harold Wright, his colleague and later his successor in the office of editor of *The Nation and Athenaeum* until that journal became *The New Statesman and Nation.* The present volume of essays—ranging from Philosophy and Mathematics through various branches of Natural Science to Classics and English Literature as these subjects appear in the currents of thought and teaching of Cambridge to-day—will stand as a memorial to the persuasive personality and enterprise of a man who cared passionately that men—and nations—should understand one another in the cause of comity and human progress.

Legal study and the several branches of political and economic science are conspicuous by their absence from the volume. Presumably the lawyer and the economist proved, each in his way, too hard a nut for even the most competent of editors to crack. No meat, at least, has come forth. But workers in these fields are not to infer that the book is not for them unless, indeed, they claim to be exceptionally dull dogs or all-knowing ones. For each contributor was asked to address himself to an intelligent reader with no previous knowledge of the particular subject, and the resulting essays all contain matter of interest to anyone of liberal mind. If it cannot be maintained that any one of them is a supreme Essay in Persuasion, nevertheless the accounts of recent developments in mathematical and classical scholarship are notably straightforward and lucid. The chapter on experimental physics opens the door invitingly to the Cavendish and other laboratories, and in the closing essay the *cause célèbre* of *The Auctioneers* v. *The Heirs of English Literature* is eloquently presented by eminent counsel. The book as a whole serves, as its editor intended, to break down the principle of 'the closed shop,' and to unite its readers upon the common ground of good learning.

M. TAPPAN HOLLOND.

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*The Law and the Constitution.* By W. I. JENNINGS, Reader in English Law in the University of London, of Gray's Inn, Barrister-at-Law. London: University of London Press, Ltd. 1933. xi and 270 pp. (6*s.* 6*d.* net.)

THIS small volume is a most valuable contribution to the study of the principles of English Constitutional Law. It should be read by every student who approaches the subject through Dicey's well-known work, containing, as it does, an independent and incisive criticism of some of that author's main positions. The work is particularly useful in its clear exposition of the nature and underlying principles of Administrative Law, a subject which has not hitherto received the attention which its importance demands. The chapter on constitutional conventions also is original in its treatment and well repays careful study.

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*The Students' Conflict of Laws.* Being an Introduction to the study of Private International Law, based on Dicey. By E. Leslie Burgin, LL.D. (Lond.), and Eric G. M. Fletcher, LL.D., B.A. (Lond.). Second edition. London: Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. 1934. 8vo. xvi and 344 pp. (20*s.*)

The new edition of this very useful text-book gives evidence of careful revision. The effect of recent statute law, such as the British Nationality Act, 1933, has been duly noted in the appropriate context and no case of importance, so far as we can see, has failed to receive attention. Reference throughout to Dr. Hibbert's *Leading Cases* has added materially to the convenience of students.

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*Constitutional Law.* First edition revised. By E. C. S. Wade, M.A., LL.M., and G. Godfrey Phillips, M.A., LL.B. London: Longmans, Green & Co. 1933. 8vo. xxiii and 476 pp. (21*s.* net.)

The original issue of this work was reviewed in the *Cambridge Law Journal* for 1932, and the prediction that it would be recognized as the ordinary text-book used by students of the subject has been fully justified. In the present revision the authors have re-written Part IX in view of the Statute of Westminster, 1931, passed after the book was published, and have added references to some recent cases of some importance, such as *Att.-Gen. for New South Wales* v. *Trethowan* [1932] A. C. 526, and statutes such as the House of Commons Disqualification (Declaration of Law) Act, 1931.

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*British Year Book of International Law, 1933.* Fourteenth year of issue. Humphrey Milford, Oxford University Press. vi and 246 pp. (16*s.*)

This number of the Year Book continues the policy of giving prominence to Private International Law, by including two articles on the subject. One is by Dr. Gutteridge on problems arising from conflict of the laws of sale, in which the learned author, after discussing the problem of unification, gives an account of some of the deliberations of the Committee of the Institute of Rome. The other article is by Mr. B. A. Wortley on the dissolution of foreign corporations. Turning to Public International Law there are articles on the Stimson doctrine of non-recognition by Dr. McNair, on the capitulatory system by Mr. Bentwich, on the rule of unanimity as applied by the Council and Assembly of the League by Mr Stone, on boycott in international relations by Dr. Lauterpacht, and on State immunity from proceedings in foreign Courts by Mr. Fitzmaurice. On the more domestic side an interesting article on the revision of international labour conventions is contributed by Mr. C. W. Jenks. As usual there is a valuable collection of Notes, and of

Decisions by both international and national tribunals. An extensive bibliography for 1932 is also given, which should be very useful to those who specialize in this branch of law.

J. W. C. T.

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*Marsden on Collisions at Sea.* Ninth edition. By Andrew Dewar Gibb, LL.B. London: Stevens & Sons, Ltd. lxxxiii and 606 pp. (40*s.* net.)

The last edition of this famous treatise was published ten years ago, since when there have been numerous decisions of importance and much new statute law. The book has been very competently revised by Mr. Gibb, who has extended his activities as a legal author on matters of collision from the land to the sea. He has decided to attribute to helm orders the same meaning as that which they bore before the Merchant Shipping Act of 1932 turned them inside out. The text has therefore not been changed to correspond with existing practice in this matter. Mr. Gibb justifies this conclusion on the ground that there has not yet been time to appreciate the effect of the alteration of helm orders, and that all the cases in which these orders are discussed were decided before 1932. Some day or other a future editor of 'Marsden' will have to come to a decision on the best method of handling this question, but Mr. Gibb seems to have acted wisely in this instance.

H. C. G.

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*The Law of Master and Servant.* Second edition. By F. Raleigh Batt. 1933. London: Sir Isaac Pitman & Sons, Ltd. xxxiv and 488 pp. (12*s.* 6*d.*)

This book has already established its reputation. The student world knows it best in connexion with the Bar Examinations, but it is a more solid treatise than a mere examination text-book. Professor Batt is a firm admirer of the genius of the Common Law without being complacent in his belief in its perfection. It is his conviction that the Common Law can best be studied by the detailed treatment of a specific topic. A subject covering such a wide range of human activity as the relationship of Master and Servant is particularly suitable for this purpose. The new edition contains some important alterations and is entirely up to date.

E. C. S. W.

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*Select Cases in the Law of Scotland.* By A. D. Gibb, LL.B., Advocate and of Gray's Inn, Barrister-at-Law. Edinburgh: W. Green & Son, Ltd. 1933. xii and 135 pp. (10*s.* net.)

This small volume of Scots Cases will be of great utility not only to students of Scots Law, for whom it is primarily intended, but also to English students, as furnishing material for comparative study, and

to students of Roman-Dutch Law, with which the Scots Law has much in common. The cases selected by Mr. Gibb on Contract and Delict are particularly instructive.

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*The Law of Income Tax.* Sixth edition. By E. M. Konstam, K.C. London: Stevens & Sons, Ltd. lxxix and 720 pp. 1933. (42*s.*)

The consolidating Income Tax Act of 1918 has up to the present year suffered amendment by fifteen other Finance Acts, so that generous compensation has by now been made for any annoyance which the slight clarification of income tax law effected by the Act of 1918 may have caused those at the head of affairs. Fortunately for the tax-payer His Honour Judge Konstam has kept pace with the Legislature, and the present edition of his well-known book will be found to give as valuable assistance as ever to the reader who is struggling to find out where he himself, or his client, is placed in this legal tangle.

J. W. C. T.

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*Annual Survey of English Law, 1932.* London: Published for the London School of Economics and Political Science by Sweet & Maxwell, Ltd. 1933. lv and 401 pp. (10*s.* 6*d.*)

Like its predecessors, the fifth issue is the joint work of the members of the Department of Law and International Studies at the London School of Economics, and it maintains their high standard. Teachers of law and students will find it extremely useful, for no other publication gives so comprehensive and accurate a view of the law of 1932. As usual, the work is divided under fourteen subjects, and a full account is given of the Legislation, Case Law and Literature relevant to each section, including a bibliography of articles in the various legal periodicals. The year 1932 made a heavy contribution toward the Law of Tort (59 pages) and Mercantile Law (65 pages). There are cases on nearly every branch of Tort, and company litigation occupies a prominent place in Mercantile Law. Property and Conveyancing occupy 25 pages, and Contract a modest 15 pages. At p. 119 Harrison should read Hamson. The cases on each topic are models of compression; all the important points are there, and they are accurate and lucid. We look forward to the next number.

T. E. L.

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*Knowles's Evidence in Brief.* Fourth edition. By Albert Lieck, Chief Clerk of the Bow Street Police Court, London, and S. Lieck, LL.B. London: Sir Isaac Pitman & Sons, Ltd. 1933. xxvi and 158 pp. (5*s.* net.)

For clarity, preciseness and practical utility, *Knowles* has commended itself to students and practitioners in the past, and the new edition

maintains the high reputation of its predecessors. The practical hints on the working of the rules of evidence are invaluable. New chapters have been added on Judicial Notice, Circumstantial Evidence and Corroboration. The two grounds of *James* v. *Audigier* (1932) 49 T. L. R. 36, are duly noted, and the work is thoroughly up to date in its references to case and statute law.

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*The Rent and Mortgage Interest Restrictions Acts, 1920 to 1933.* By T. J. Sophian, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1933. xxi and 221 pp. (10*s.* 6*d.* net.)

If the object of legislation is the increase of litigation, these Acts have been an undoubted success. To give successful advice no practitioner can be without *Sophian*. The complete Acts are set out section by section and carefully annotated, and complete summaries are given in general introductory notes. This coupled with cross-references and a very full Index facilitates the task of the practitioner. The repealed statutes and Statutory Rules and Orders appear in the Appendix. The mass of case law is duly incorporated in the notes to each section. The book is an excellent guide to the maze of the Rent Acts.

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*Rent and Mortgage Interest Restrictions.* Being the Rent and Mortgage Interest Restrictions Acts, 1920—1933. Fifteenth edition. By the Editors of 'Law Notes.' London: Law Notes Publishing Offices, 25 & 26 Chancery Lane. 1933. xxiv and 273 pp. (7*s.*; cloth covers 8*s.* 6*d.* net.)

The publications of the Editors of 'Law Notes' are always the first in the field, and are always lucid and accurate. Practitioners have relied for years on this indispensable work; the new edition does not need our benediction. Those harassed by the bulk and complexity of the Rent Acts and the conflicting cases thereon know where to turn. Would that Parliament realized the dire necessity for consolidation which is made manifest in the Preface! There is an introductory sketch, followed by a detailed annotation of all the sections of the Acts. The repealed statutes and the relevant Rules and Orders are set out in the Appendix, upon which follows a comprehensive Index.

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*The Old Bailey: History, Constitution, Functions, Notable Trials.* By Albert Crew, Barrister-at-Law. London: Ivor Nicholson & Watson, Ltd. 1933. xvi and 302 pp. (18*s.*)

This book combines interest and instruction, and should be read by everyone interested in the administration of justice. The title sufficiently

well indicates the contents. The old system and the new are set out in vivid contrast, and a useful account is given of past and present judges and lawyers. The chapter on ' A Day at the Central Criminal Court ' is particularly informative. There is a splendid selection of notorious trials between 1910 and 1931, from *R.* v. *Crippen* to *R.* v. *Kylsant*. The book is extremely well illustrated. It is a real mine of information, and shows patient research. It is well written; we have enjoyed the reading, and thoroughly recommend it.

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*Company Case Law.* By H. G. W. Cook, LL.D., of the Middle Temple, Barrister-at-Law; assisted by J. W. Baggally, M.A., of the Inner Temple, Barrister-at-Law. London: Sir Isaac Pitman & Sons, Ltd. 1933. xv and 172 pp. (7*s.* 6*d.* net.)

This is an extremely useful and well selected digest of about 140 leading cases, accompanied by short explanatory notes. The Companies Acts present peculiar difficulties to the student, but this collection of cases will make his work much easier. No branch of law can be understood without reading cases, and this collection can be read with profit by all who are interested in companies, and by those who want to understand the law.

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*Conveyancers' Scales and Costs.* By F. W. Broadgate. London: Sir Isaac Pitman & Sons, Ltd. 1933. xvi and 191 pp. (12*s.* 6*d.* net.)

The work of an expert on costs requires no recommendation. This is an enlarged and up-to-date edition of the author's previous works on Conveyancers' Scales and Conveyancers' Costs.

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*Carriage of Goods by Sea Act, 1924.* By Richard Williamson, of the Middle Temple and King's Inns, Barrister-at-Law, and C. H. Withers Payne, LL.D. (Lond.), Solicitor. With a Foreword by Sir Robert W. Aske, Bart., LL.D., of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1934. xix and 183 pp. (12*s.* 6*d.*)

The first two chapters of this book set out each section of the Act and each rule scheduled therein, accompanied by explanatory comments—including an interesting discussion of the effect of non-compliance with section 3—and references to decided cases. These, with a nine-page chapter on Conflict of Laws, complete the seventy pages of text. The appendices (which absorb the remaining 100 pages) repeat the Act of 1924, and add those sections of the Merchant Shipping Act to which that Act refers, the Bills of Lading Act, 1855, and various relevant American,

Dominion, and Colonial enactments. Appendix D appears to contain suggested clauses for bills of lading, but is unexplained; the Table of Contents suggests that its inclusion is unintentional. The whole should be of great assistance to all concerned with the law on this topic.

S. J. B.

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*The Law relating to Personal Injuries.* By Frederick George Neave, LL.D. (Lond.), Solicitor, in collaboration with Grange Turner, M.A. (Cantab.), of the Inner Temple, Barrister-at-Law. Second edition. London: Sir Isaac Pitman & Sons, Ltd. 1933. xv and 134 pp. (6*s*.)

This little book contains short chapters on assault, animals, malicious prosecution, and false imprisonment—allotting not more than ten small pages to each topic—and longer chapters on negligence (36 pp.), defamation (33 pp.), and damages (19 pp.). References to authorities have been incorporated in the new edition, thereby increasing its utility as a readable introduction to the subject.

S. J. B.

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*Executors and Administrators.* By N. E. Mustoe, M.A., LL.B., of Gray's Inn, Barrister-at-Law. London: Butterworth & Co., Ltd. 1933. xxii and 190 pp. Index (separately paged), 18 pp. (12*s*. 6*d*. net.)

Mr. Mustoe's book is a good introduction to the law relating to executors and administrators. The style is clear: the subject-matters are systematically arranged: the text is illustrated by statements of many of the leading cases. Some of the principal points are set out in heavy type for emphasis: differences between the law before 1926 and after 1925 are indicated: tables of statutes and cases facilitate reference. The short appendix contains forms, such as executor's oath, administrator's bond, order for general administration, etc. As an illustration of compression accompanied by lucidity attention may be drawn to the account of the rule in *Allhusen* v. *Whittle* (1867) L. R. 4 Eq. 295 as to the apportionment between capital and income of the burden of the debts and legacies payable out of the estate (pp. 157-8, 162-3). The volume will be useful to students of law, accountancy, banking, and secretarial practice. It presents the main rules and principles in a small compass.

H. D. H.

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*Specific Performance Practice.* By John J. Wontner. London: Sir Isaac Pitman & Sons, Ltd. 1933. xiii and 90 pp. (7*s*. 6*d*.)

This is a small manual for the practitioner who needs a guide to the practice in straightforward cases of specific performance. There are

ample illustrations of pleadings, a table of fees and a specimen bill of costs. It, of course, in no sense rivals the classic work of the late Lord Justice Fry, a new edition of which the author calls for in his preface. The book deals with eight separate contracts in the space of sixty pages, though naturally the greater part of these is devoted to the contract of sale of land. That there is no citation of *Walsh* v. *Lonsdale* is remarkable, having regard to the effect of this decision on the substantive law.

E. C. S. W.

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*A Guide to the Inspection of Deeds.* By A. Lawson Fearnley. London: Sir Isaac Pitman & Sons, Ltd. 1933. x and 158 pp. (5*s*.)

This guide is intended primarily for the use of auditors, bank inspectors and others whose professional work involves the inspection of deeds relating to land. It cannot be recommended for the stricter investigation of title demanded of the conveyancer. The general descriptions are apt to mislead and in some cases are definitely incorrect.

E. C. S. W.

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*Mistake in the Law of Contract.* By Roland Champness, M.A., LL.M. London: Stevens & Sons, Ltd. 1933. 8vo. xvi and 112 pp. (5*s*. net.)

A clear and comprehensive summary of a subject which has given rise to much difficulty and on which there still exists much conflict of opinion. The author's discussion of the recent case of *Bell* v. *Lever Brothers* [1932] A. C. 161 will repay perusal. Some further elaboration of it would be well justified in assisting students to an understanding of the conflicting points of view of the judges in the House of Lords.

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*Essays in Equity.* By H. G. Hanbury, B.C.L., M.A. Oxford: At the Clarendon Press. 1934. xvi and 160 pp. (10*s*. 6*d*. net.)

This is a collection of articles contributed to the *Law Quarterly Review* and the *Journal of the Society of Public Teachers of Law* by the University Lecturer in Equity at Oxford, with the addition of an Essay on Equity in Public Law, in which he explores what may be said to be new territory. All these essays are informing and suggestive and will be cordially welcomed in this convenient form.

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*The Road to the Law.* By Dudley Cammett Lunt. New York and London: McGraw-Hill Publishing Co. 1932. xiv and 281 pp. (10*s.* 6*d.*)

This book will appeal to lawyers and laymen alike as it explains, in a style as free from technicality as the subject admits, the underlying principles of the common law by illustrations from leading cases in English and American Courts presented to the reader in familiar language. Among other features of the book are some excellent reproductions of views of the old English Courts.

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*Palmer's Company Precedents.* Part III.—Debentures and Debenture Stock. Fourteenth edition. By Alfred F. Topham, LL.M., Bencher of Lincoln's Inn, one of His Majesty's Counsel, and A. M. R. Topham, B.A., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1933. cx and 1026 pp. (£2 10*s.* net.)

As this volume completes the first edition of 'Palmer' to be published since the passing of the Companies Act, 1929, its value to practitioners is obvious. Moreover, now that this volume has appeared, it is an advantage that the editors have waited until some experience has been obtained of the working of that Act and they are able to offer more than a mere paraphrase of the new sections. A large number of new precedents based on the new law and practice have, in fact, been included and there is evidence throughout that the volume has been conscientiously revised. It would have been an improvement, however, if the text of the Companies Act, 1929, had been included in this volume.

B. F. M.

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*Evidence and Procedure at a Glance.* By F. J. Carey and A. K. Das. London: Sir Isaac Pitman & Sons, Ltd. 1933.

A useful table of points for revision.

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*Pitman's Law Clerk's Desk Book.* Edited by F. W. Broadgate. London: Sir Isaac Pitman & Sons, Ltd. 1933. ix and 278 pp. (6*s.* net.)

This is a collection of indispensable information covering a very wide range of matters which constantly arise in practice. The arrangement of topics facilitates reference to any item.

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*County Court Practice Made Easy or Debt Collection Simplified.* Seventh edition. By a Solicitor. London: Sir Isaac Pitman & Sons, Ltd. 1933. x and 151 pp. (5*s.* net.)

THIS gives full information of the various steps in debt collection from the letter for payment to the enforcement of judgment and recovery of the money.

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Other books and publications received (some of these will be reviewed in the next issue):—

*Diplomatic and Consular Laws and Regulations of Various Countries.* Edited by A. H. FELLER and MANLEY O. HUDSON. 2 vols. Carnegie Endowment for International Peace, Washington D.C. ($5 per set.)

*High Court of Admiralty Examinations (MS. Volume* 53), *1637—1638.* By DOROTHY O. SHILTON and RICHARD HOLWORTHY. Issued to the members of the Anglo-American Records Foundation. 1932. xxxi and 330 pp.

*Lectures on International Law.* By SIR THOMAS ERSKINE HOLLAND. Edited by THOMAS ALFRED WALKER and WYNDHAM LEGH WALKER. London: Sweet & Maxwell, Ltd. 1933. xlii and 576 pp. (30*s.* net.)

*A Manual of International Law.* By S. JACKSON, LL.B. London: Sweet & Maxwell, Ltd. 1933. vi and 163 pp. (5*s.* net.) Useful as a student's notebook.

*Law of Scotland, Sources and Judicial Organization.* By STUART G. KERMACK, Advocate. Librairie du Recueil Sirey, Paris. 1933. 53 pp. (20 fr.)

*Handbook of the Cambridge Law School, 1933—1934.* Cambridge University Press. viii and 144 pp. (2*s.* 6*d.*)

*Precedent in English and Continental Law.* An Inaugural Lecture delivered before the University of Oxford. By A. L. GOODHART, D.C.L., LL.D., Professor of Jurisprudence. London: Stevens & Sons, Ltd. 1934. 55 pp. (Will be reviewed in the next issue.)

*Deutschlands Gleichberechtigung als Rechtsproblem.* VON VIKTOR BRUNS. Carl Heymanns Verlag in Berlin. 1934. 35 pp. (RM. 1.)

*Internationales Finanzrecht.* Von ERNST ISAY. Verlag W. Kohlhammer, Stuttgart and Berlin. 1934. v and 285 pp. (RM. 12.)

*Lappiske Rettsstudier.* Av ERIK SOLEM. Oslo: H. Aschehong & Co. (W. Nygaard). 1933. 342 pp. (N.kr. 10.)

*Regional Guarantees of Minority Rights: A Study of Minorities Procedure in Upper Silesia.* By JULIUS STONE. New York: The Macmillan Co. 1933. xvi and 323 pp. ($3.75)

*A Handbook of Procedure.* By J. A. Balfour. London: Stevens & Sons, Ltd. 1933. xvi and 151 pp. (7*s.* 6*d.* net.)

*Criminal Procedure.* By Gordon C. Touche and Frederic E. Ruegg. Second edition. London: Stevens & Sons, Ltd. 1933. xvi and 136 pp. (7*s.* 6*d.* net.)

*Wirtschaft und Insolvenzrecht in Dänemark, 1932.* Von Henning Holm-Nielsen, Kopenhagen. 7 pp. (Price not stated.)

*Death Duties.* Index and Summary. By D. Guyther Moore, a Solicitor of the Supreme Court. London: Pitman & Sons, Ltd. 1933. (2*s.* 6*d.* net.) A very handy summary covering the essentials in fifteen pages.

*The 1931 Form of Building Contract.* By William T. Creswell, K.C., assisted by C. G. Armstrong Cowan, Barrister-at-Law. London: Pitman & Sons, Ltd. 1933. xi and 171 pp. (7*s.* 6*d.* net.) This book contains all the law and practical assistance required by builders, architects and surveyors, and a detailed explanation of the 1931 Form of Contract.

*The Law of Public Meeting and the Right of the Police Search.* Prepared by a Committee of the Haldane Club, No. 13. Issued by the New Fabian Research Bureau. London: Victor Gollancz, Ltd. 1933. 28 pp. (6*d.* net.) This is an extremely clear account of the right of public meeting, the powers of the Courts to interfere, and the right to search. The work is well annotated with cases and statutes. *Elias* v. *Pasmore* receives due prominence.

*Law of Scotland.* Sources and Juridical Organization. By Stuart G. Kermack, Advocate. Paris: Recueil Sirey. 1933. This is the second part of the British Empire section of the sources of positive law published by the Académie Internationale de Droit Comparé.

*The Bell Yard.* No. XI, May, 1933; No. XII, November, 1933. Editors: J. G. Foster, M.A., and E. C. Godber. The Law Society and the Solicitors' Law Stationery Society, Ltd. Articles on 'The History of the Court of King's Bench,' by Sir George Bonner; 'Remarks on Law and Legal Education in the United States, Part II,' by H. G. Hanbury, M.A., B.C.L.; 'The Portuguese Bank Note Case,' by Cecil Binney; 'Essence of Stephen,' by M. B. Pascoe. 'Commercial Companies in French Law,' by Sir Maurice Amos; 'Philippus: A Dialogue on Natural Law,' by Denis Browne; 'The Characteristics of Local Government Law,' by W. Ivor Jennings, M.A., LL.D.; 'Doctors' Commons,' by Cyril Elman.

*Georgetown Law Journal.* Washington D.C. Georgetown Law Journal Association. Vol. XXI, No. 4, May, 1933. The leading articles of interest to us are 'Roman Law in the Works of St. Augustine,' by Rev. Francesco Lardone; 'Use of Statutory Materials in Teaching Equity,' by S. P. Simpson; Vol. XXII, No. 1, November, 1933, 'Leases in the Fourteenth Century,' by Joseph D. Sullivan; Vol. XXII, No. 2,

January, 1934, Tercentennial Number, ' Modern Law of Nations and its Municipal Sanctions,' by J. Brown Scott.

*Tulane Law Review.* Vol. VII, No. 4, June, 1933. Leading articles of interest to us are ' Hierarchy of Sources and Forms in Different Systems of Law,' by Roscoe Pound; ' Prize Law Procedure at Sea—Its Early Development,' by Francis Deák and P. C. Jessup; ' Firearms and Legal Doctrine,' by F. E. Inbau; ' Yellow Dog Contract in its Relation to Public Policy,' by C. E. Bonnett; Vol. VIII, No. 1, December, 1933, ' A Comparative View of the Interpretation of Statute Law,' by H. C. Gutteridge; ' Comparison of Delictual Responsibility in the Law of Countries Governed by a Code,' by E. F. Surveyer; ' Dogmatic and Comparative Law,' by Mario Rotondi; Vol. VIII, No. 2, February, 1934, ' Place of Comparative Law in American Law School Curriculum,' by Roscoe Pound; ' Legislator's Interest in Comparative Legal Studies,' by C. F. McGuire; ' Religious Communities and Courts in Palestine,' by F. M. Goadby.

*Love, Woman and Marriage* in relation to Law and Literature. Address to University of Baltimore Graduates, 1933. By Judge Eugene O'Dunn. The Daily Record. Baltimore. Case Involving Constitutionality of New ' Emergency ' Banking Law of Maryland, March 4, 1933, reprinted from Daily Record. Baltimore, March 28, 1933.

*La Notion du ' Politique ' et la Théorie des Differends Internationaux.* Par Hans Morgenthau, Docteur en Droit. Paris: Librairie du Recueil Sirey. 1933. 92 pp. (12 fr.)

*Law in Literature.* By Lord Finlay. A Reading delivered before the Honourable Society of the Middle Temple on May 4, 1933. London: Pitman & Sons, Ltd. 1933. 20 pp. (1*s.* net.)

*No More War on Foreign Investments.* A Kellogg Pact for Private Property. By Dr. F. W. Bitter and Dr. A. Zelle. Introduction by Chester Cuthell. Philadelphia: Dorrance & Co. 1933. 86 pp.

*Snell's Equity.* Twenty-first edition. By H. Gibson Rivington, M.A. London: Sweet & Maxwell, Ltd. 1934. clviii and 660 pp. (£1 10*s.* net.) (To be reviewed in next issue).

*The American Doctrine of Judicial Supremacy.* By C. G. Haines. Berkley: University of California Press. 1933. 705 pp. ($5.) (Will be reviewed in our next issue.)

*Principles of Mercantile Law.* By J. Charlesworth, LL.D., Barrister-at-Law. Third edition. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1934. xl and 382 pp. (8*s.* 6*d.* net.) (Will be reviewed in our next issue.)